

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JON S. TIGAR, JUDGE

IN RE CALIFORNIA BAIL)
BOND ANTITRUST LITIGATION,)
_____)

NO. C-19-0717 JST

WEDNESDAY, OCTOBER 16, 2019

OAKLAND, CALIFORNIA

MOTION TO DISMISS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

LIEFF CABRASER HEIMANN & BERNSTEIN
275 BATTERY STREET, 29TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111
BY: DEAN M. HARVEY, ESQUIRE
KATHERINE C. LUBIN, ESQUIRE
ADAM GITLIN, ESQUIRE
YAMAN SALAH, ESQUIRE

**FOR DEFENDANT SEAVIEW
INSURANCE/TWO JINN:**

COOLEY, LLP
101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111
BY: BEATRIZ MEJIA, ESQUIRE
MAXIMILIAN SLADEK DE LA CAL, ESQ.

COOLEY, LLP
4401 EASTGATE MALL
SAN DIEGO, CALIFORNIA 92121
BY: JON F. CIESLAK, ESQUIRE

(APPEARANCES CONTINUED)

REPORTED BY:

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 **FOR DEFENDANT** DLA PIPER
2 **DANIELSON NATIONAL** 444 WEST LAKE STREET, SUITE 900
3 **INSURANCE:** CHICAGO, ILLINOIS 60606
 BY: JOHN HAMILL, ESQUIRE
 MICHAEL MURPHY, ESQUIRE

4
5 **FOR DEFENDANT** ROPERS MAJESKI KOHN BENTLEY
6 **WILLIAM CARMICHAEL/** 1001 MARSHALL STREET, STE. 500
7 **AMERICAN BAIL** REDWOOD CITY, CALIFORNIA
8 **COALITION:** BY: NICOLE S. HEALY, ESQUIRE
 EDWIN BARNES, ESQUIRE

9 **FOR DEFENDANT** NORTON ROSE FULBRIGHT US LLP
10 **AMERICAN CONTRACTORS** 1301 MCKINNEY, SUITE 5100
11 **INDEMNITY:** HOUSTON, TEXAS 77010
 BY: GERARD G. PECHT, ESQUIRE

12 **FOR DEFENDANT** MICHELMAN & ROBINSON, LLP
13 **US FIRE/NORTH** 17901 VON KARMAN AVENUE, 10TH FLOOR
14 **RIVER INSURANCE/** IRVINE, CALIFORNIA 92614
15 **SENECA:** BY: VINCENT LOH, ESQUIRE

16 **FOR DEFENDANT** FOLEY & LARDNER
17 **CONTINENTAL HERITAGE:** 555 SOUTH FLOWER STREET, SUITE 300
18 LOS ANGELES, CALIFORNIA 90071
19 BY: ERIK SWANHOLT, ESQUIRE

20 **FOR DEFENDANT** LAW OFFICE OF BRENDAN PEGG
21 **FINANCIAL CASUALTY** 201 E. OJAI AVENUE, #1505
22 **& SURETY:** OJAI, CALIFORNIA 93024
 BY: BRANDAN PEGG, ESQUIRE

23 **FOR DEFENDANT** GREENBERG TRAUIG, LLP
24 **AMERICAN SURETY/** FOUR EMBARCADERO CENTER, SUITE 3000
25 **INDIANA LUMBERMENT:** SAN FRANCISCO, CALIFORNIA 94111
 BY: HOWARD HOLDERNESS, ESQUIRE

26 **FOR DEFENDANT** DRINKER BIDDLE & REATH
27 **ACCREDITED CASUALTY** FOUR EMBARCADERO CENTER, 27TH FLOOR
28 **& SURETY:** SAN FRANCISCO, CALIFORNIA 94111
 BY: PAUL J. RIEHLE, ESQUIRE

1 **FOR DEFENDANT** SMITH, GAMBRELL & RUSSELL, LLP
2 **WILLIAMSBURG:** 444 SOUTH FLOWER STREET, SUITE 1700
 LOS ANGELES, CALIFORNIA 90071
3 BY: ANNE K. EDWARDS, ESQUIRE

4 **FOR DEFENDANT** LAW OFFICES OF GREGORY S. DAY
5 **CALIFORNIA BAIL** 120 BIRMINGHAM DRIVE, SUITE 200
6 **AGENTS ASSN./** CARDIFF, CALIFORNIA 92007
7 **UNIVERSAL FIRE &** BY: GREGORY S. DAY, ESQUIRE
8 **LIFE/ SUN SURETY:**

9 **FOR DEFENDANT** LAW OFFICE OF JOHN M. RORABAUGH
10 **GOLDEN STATE BAIL** 801 PARKCENTER DRIVE, SUITE 205
11 **ASSN.:** SANTA ANA, CALIFORNIA 92705
 BY: CRYSTAL L. RORABAUGH, ESQUIRE

12 **FOR DEFENDANT** BINGHAM GREENEBAUM DOLL
13 **LEXON INSURANCE:** 101 SOUTH FIFTH STREET
 LOUISVILLE, KENTUCKY 40202
 BY: W. SCOTT CROFT, ESQUIRE

14 **FOR DEFENDANT** KONING ZOLLAR, LLP
15 **ALL PRO BAIL** 2210 ENCINITAS BLVD., SUITE S
16 **BONDS:** ENCINITAS, CALIFORNIA 92024
 BY: DREW KONING, ESQUIRE

17 **FOR DEFENDANT JERRY** ROXBOROUGH POMERANCE NYE & ADREANI
18 **WATSON/ALLEGHENY** 5820 CANOGA AVENUE
19 **CASUALTY/INTERNATIONAL** WOODLAND HILLS, CALIFORNIA 91367
20 **FIDELITY/LEXINGTON BY:** GARY A. NYE, ESQUIRE
21 **INTERNATIONAL/BANKERS**
22 **INSURANCE CO.:**

23 **FOR DEFENDANT** HINSHAW LAW
24 **PHILADELPHIA** ONE CALIFORNIA STREET, 18TH FLOOR
25 **REINSURANCE CO.:** SAN FRANCISCO, CALIFORNIA 94111
 BY: TRAVIS R. WALL, ESQUIRE

1 WEDNESDAY, OCTOBER 16, 2019

2:05 P.M.

2 P R O C E E D I N G S

3 **THE CLERK:** REMAIN SEATED AND COME TO ORDER. COURT
4 IS IN SESSION. THE HONORABLE JOHN S. TIGAR PRESIDING.

5 YOUR HONOR, NOW CALLING CIVIL MATTER 19-0717 IN RE
6 CALIFORNIA BAIL BOND ANTI LITIGATION -- ANTITRUST LITIGATION.

7 IF COUNSEL COULD PLEASE GIVE THEIR APPEARANCES FOR THE
8 RECORD.

9 **MR. HARVEY:** GOOD AFTERNOON, YOUR HONOR. DEAN HARVEY
10 OF LIEFF, CABRASER, HEIMANN & BERNSTEIN ON BEHALF OF THE
11 CLASS.

12 **MS. LUBIN:** GOOD AFTERNOON. KATHERINE LUBIN ALSO
13 WITH LIEFF, CABRASER ALSO FOR THE PLAINTIFFS.

14 **MR. SALAHI:** GOOD AFTERNOON. YAMAN SALAHI WITH
15 LIEFF, CABRASER FOR PLAINTIFFS.

16 **MR. GITLIN:** GOOD AFTERNOON, YOUR HONOR. ADAM
17 GITLIN, LIEFF, CABRASER FOR PLAINTIFFS.

18 **MS. MEJIA:** GOOD AFTERNOON, YOUR HONOR. BEATRIZ
19 MEJIA OF COOLEY FOR TWO JINN DEFENDANTS AND SEAVIEW INSURANCE
20 COMPANY.

21 **MR. HAMILL:** GOOD AFTERNOON, YOUR HONOR. JOHN HAMILL
22 OF DLA PIPER ON BEHALF OF DANIELSON NATIONAL INSURANCE
23 COMPANY.

24 **MR. NYE:** GOOD AFTERNOON, YOUR HONOR. GARY NYE ON
25 BEHALF OF JERRY WATSON, INTERNATIONAL FIDELITY INSURANCE

1 COMPANY, ALLEGHENY CASUALTY COMPANY, HARCO NATIONAL INSURANCE
2 COMPANY, LEXINGTON NATIONAL INSURANCE COMPANY, AND BANKERS
3 INSURANCE COMPANY.

4 **MR. RIEHLE:** GOOD AFTERNOON, YOUR HONOR. PAUL
5 RIEHLE, DRINKER, BIDDLE & REATH FOR ACCREDITED SURETY
6 CASUALTY.

7 **MR. KONING:** GOOD AFTERNOON, YOUR HONOR. DREW KONING
8 OF KONING --

9 **THE REPORTER:** I'M SORRY, SAY YOUR NAME AGAIN?

10 **THE COURT:** SAY YOUR NAME AGAIN.

11 **MR. KONING:** DREW KONING.

12 **THE COURT:** MADAME REPORTER, D-R-E-W K-O-N-I-N-G.

13 **THE REPORTER:** THANK YOU.

14 **MR. CIESLAK:** GOOD AFTERNOON, YOUR HONOR. JON
15 CIESLAK OF COOLEY, LLP ON BEHALF OF SEAVIEW INSURANCE COMPANY
16 AND TWO JINN, INC.

17 **MS. HEALY:** GOOD AFTERNOON, YOUR HONOR. NICOLE HEALY
18 FROM ROPERS, MAJESKI, KOHN & BENTLEY ON BEHALF OF WILLIAM
19 CARMICHAEL AND AMERICAN BAIL COALITION.

20 **MR. WALL:** GOOD AFTERNOON, YOUR HONOR. TRAVIS WALL,
21 HINSHAW & CULBERTSON ON BEHALF OF PHILADELPHIA REINSURANCE
22 CORPORATION.

23 **MR. SLADEK DE LA CAL:** GOOD AFTERNOON, YOUR HONOR.
24 MAX SLADEK DE LA CAL OF COOLEY, LLP ON BEHALF OF SEAVIEW
25 INSURANCE COMPANY AND TWO JINN, INC.

1 **MR. DAY:** GOOD AFTERNOON, YOUR HONOR. GREG DAY HERE
2 ON BEHALF OF SUN SURETY INSURANCE COMPANY, UNIVERSAL FIRE AND
3 LIFE, AS WELL AS THE CALIFORNIA BAIL ASSOCIATION.

4 **MS. EDWARDS:** GOOD AFTERNOON, YOUR HONOR. ANN
5 EDWARDS ON BEHALF OF WILLIAMSBURG NATIONAL INSURANCE COMPANY.

6 **MR. CROFT:** GOOD AFTERNOON, YOUR HONOR. SCOTT CROFT
7 OF BINGHAM GREENEBAUM DOLL ON BEHALF OF LEXON INSURANCE
8 COMPANY.

9 **MS. RORABAUGH:** GOOD AFTERNOON, YOUR HONOR. CRYSTAL
10 RORABAUGH FROM THE OFFICE OF JOHN RORABAUGH ON BEHALF OF
11 GOLDEN STATE BAIL ASSOCIATION.

12 **MR. LOH:** GOOD AFTERNOON, YOUR HONOR. VINCENT LOH OF
13 MICHELMAN & ROBINSON ON BEHALF OF U.S. FIRE INSURANCE, NORTH
14 RIVER FIRE INSURANCE COMPANY, AS WELL AS SENECA INSURANCE
15 COMPANY.

16 **MR. HOLDERNESS:** GOOD AFTERNOON, YOUR HONOR. HOWARD
17 HOLDERNESS FROM GREENBERG TRAUIG ON BEHALF OF AMERICAN SURETY
18 AND INDIANA LUMBERMENT.

19 **MR. PECHT:** YOUR HONOR, GERRY PECHT OF NORTON ROSE
20 FULBRIGHT ON BEHALF OF AMERICAN CONTRACTORS INDEMNITY.

21 **MR. MURPHY:** YOUR HONOR, MICHAEL MURPHY, DLA PIPER ON
22 BEHALF OF DANIELSON INSURANCE.

23 **MR. PEGG:** GOOD AFTERNOON, YOUR HONOR. BRENDAN PEGG
24 ON BEHALF OF FINANCIAL CASUALTY & SURETY COMPANY.

25 **MR. BARNES:** GOOD AFTERNOON, YOUR HONOR. EDWIN

1 BARNES OF ROPERS, MAJESKI, KOHN, BENTLEY ON BEHALF OF WILLIAM
2 CARMICHAEL AND AMERICAN BAIL COALITION.

3 **MR. SWANHOLT:** GOOD AFTERNOON, YOUR HONOR. ERIK
4 SWANHOLT OF FOLEY & LARDNER ON BEHALF OF CONTINENTAL HERITAGE.

5 **THE COURT:** EVERYBODY, WELCOME. IT'S POSSIBLE THAT
6 ONE OF YOU HADN'T CHECKED IN YET. I THINK I HAVE ONE MORE
7 NAME -- I HEARD ONE MORE NAME A MOMENT AGO THAN I HAVE ON MY
8 DANCE CARD IN FRONT OF ME. SO YOU GOT A LIST OF ALL THE
9 NAMES, MS. LEE?

10 **THE CLERK:** I'M SORRY, YOUR HONOR, NO.

11 **THE COURT:** OKAY. WELL, I COULD GO BACK THROUGH THE
12 WHOLE EXERCISE AND WE COULD FIGURE OUT WHERE THE OVERAGE IS
13 BUT WE WON'T DO THAT.

14 **MR. MURPHY:** IT MIGHT BE ME, YOUR HONOR.

15 **THE COURT:** I DON'T THINK IT IS. I WILL ENCOURAGE
16 YOU ALL TO CHECK IN WITH THE COURTROOM DEPUTY BEFORE YOU LEAVE
17 IF YOU DIDN'T DO THAT. IF YOU DID DO THAT, THEN I AM CERTAIN
18 SHE GOT YOUR NAME.

19 SO LET'S GET UNDERWAY WITH THE HEARING. THE MATTER IS ON
20 CALENDAR TODAY FOR MOTIONS TO DISMISS THE CONSOLIDATED AMENDED
21 COMPLAINT IN THIS CASE. I DON'T OFTEN BEGIN A HEARING BY
22 ANNOUNCING A TENTATIVE, BUT I WANTED TO DO IT TODAY BECAUSE I
23 WAS WORRIED THAT OTHERWISE OUR TIME WOULD NOT BE USED
24 PRODUCTIVELY. THERE ARE JUST TOO MANY ISSUES. SO, LET ME DO
25 THAT NOW.

1 I THINK PLAINTIFF -- THERE REALLY ARE TWO CATEGORIES OF
2 CLAIMS HERE. ONE IS A CONSPIRACY TO SUBMIT UNIFORM MAXIMUM
3 RATES AND THE OTHER IS A REFUSAL OR DECLINATION TO PROVIDE
4 REBATES. THOSE ARE THE TWO CATEGORIES OF CLAIMS.

5 I THINK THE FIRST SET OF CLAIMS ON A CONSPIRACY TO SUBMIT
6 UNIFORM MAXIMUM RATES TO THE CALIFORNIA DEPARTMENT OF
7 INSURANCE IS BARRED BY THE MCCARRAN-FERGUSON ACT. IF I STICK
8 WITH THAT CONCLUSION, THEN I WON'T REACH THE OTHER ARGUED
9 IMMUNITIES. BECAUSE THAT'S AN ISSUE OF LAW, IF THE PLAINTIFFS
10 WANT TO CHALLENGE THAT RULING OR EVEN IF THEY JUST WANT A
11 CHANCE TO AMEND, I THINK THEY SHOULD EXPLAIN HOW THEY THINK
12 THEY CAN AMEND. I'M NOT SEEING IT. SO, UNLESS I HEAR A GOOD
13 ARGUMENT TODAY, THEN THOSE CLAIMS WOULD BE DISMISSED WITH
14 PREJUDICE.

15 TURNING TO THE CLAIMS NOT TO DISCOUNT A REBATE, AND I'LL
16 GET TO THE 12(B)(6) POINTS IN A SECOND BECAUSE I THINK THERE
17 ARE SOME ISSUES THERE, TOO, BUT TURNING TO THE ALLEGED
18 AGREEMENTS NOT TO DISCOUNT OR REBATE, THOSE CLAIMS ARE NOT
19 BARRED BY THE MCCARRAN-FERGUSON ACT BECAUSE THAT PRACTICE, IF
20 IT'S OCCURRING, HAS NOTHING TO DO WITH SPREADING THE RISK THAT
21 A DEFENDANT WILL JUMP BAIL.

22 ALSO THOSE CLAIMS ARE NOT BARRED BY THE STATE ACTION
23 DOCTRINE. THE TEST FOR STATE ACTION IMMUNITY IS THAT THE
24 CHALLENGE RESTRAINT MUST REFLECT A CLEARLY ARTICULATED STATE
25 POLICY THAT PERMITS THE ANTICOMPETITIVE CONDUCT AND THAT THE

1 PERMITTED ANTICOMPETITIVE ACTIVITIES ARE ACTIVELY SUPERVISED
2 BY THE STATE.

3 THOSE CLAIMS PROBABLY FAIL THE FIRST TEST. THEY
4 DEFINITELY FAIL THE SECOND TEST. SO I DON'T SEE THOSE CLAIMS
5 AS BEING BARRED BY THE STATE ACTION DOCTRINE. AND THE
6 DEFENDANTS HAVE CONCEDED THAT THOSE CLAIMS ARE NOT BARRED BY
7 THE FILED RATE DOCTRINE, SO THAT DISPOSES OF THE IMMUNITY
8 CLAIMS.

9 I DON'T THINK SECTION 1860.1 BARS THE REBATING CLAIMS
10 BECAUSE THAT -- THOSE CLAIMS ARE NOT A CHALLENGE TO THE
11 REASONABLENESS OF AN APPROVED RATE, WHICH IS WHAT'S REQUIRED
12 FOR 1860.1.

13 TURNING TO THE 12(B)(6) ARGUMENTS. THE COURT WOULD
14 TENTATIVELY GRANT THE MOTION FOR CERTAIN DEFENDANTS ON THE
15 GROUND THAT AS TO THOSE DEFENDANTS, PLAINTIFFS FAILED TO
16 ALLEGE SUFFICIENT FACTS ABOUT HOW EACH DEFENDANT JOINED OR
17 PARTICIPATED IN THE ALLEGED CONSPIRACY. I FIND JUDGE CONTI'S
18 ORDER IN *CRT* TO BE DISTINGUISHABLE.

19 ON THAT GROUND, I WOULD DISMISS THE SURETY DEFENDANTS, THE
20 BAIL AGENCY ALL-PRO, AND THE TRADE ASSOCIATION GSBAA. I'M
21 SORT OF ON THE FENCE ABOUT THE TWO INDIVIDUAL DEFENDANTS FOR
22 REASONS I WON'T GET INTO AT THE MOMENT.

23 WITH REGARD TO THE ALLEGATIONS OF A CONSPIRACY, I THINK
24 THERE ARE PLENTY OF PLUS FACTORS IN THE COMPLAINT, IDENTIFIED
25 IN THE COMPLAINT. WHAT THERE ISN'T IS A PLAUSIBLE CASE OF

1 PARALLEL CONDUCT. THAT'S WEIRD BECAUSE NORMALLY ON THIS KIND
2 OF MOTION YOU SEE PLENTY OF THE SECOND THING BUT NOT ENOUGH OF
3 THE FIRST THING, AND HERE IT'S THE OPPOSITE.

4 SO FOCUSING ONLY ON REBATING, AGAIN, CORRECT ME IF I'M
5 WRONG, I THINK PLAINTIFFS' ONLY ALLEGATION IS THAT THE
6 DEFENDANTS -- THE ONLY ALLEGATION THAT THE DEFENDANTS DON'T,
7 IN FACT, OFFER REBATES IS THE STATEMENT IN THE COMPLAINT THAT
8 DEFENDANTS QUOTE "GENERALLY REFRAIN FROM OFFERING COMPETITIVE
9 REBATES." MAYBE THERE'S MORE PARALLEL CONDUCT THERE THAT I
10 DIDN'T SEE WHEN I WAS READING THE COMPLAINT.

11 THOSE ARE ALL TENTATIVE RULINGS. I THINK WHAT WE WILL DO
12 IS, I WILL HEAR FROM THE DEFENDANTS. SOME OF THIS IS
13 TENTATIVELY GOING THEIR WAY, BUT STILL IT'S THEIR MOTION.
14 THEN THE PLAINTIFFS, THEN THE DEFENDANTS, BUT THEN I WILL HEAR
15 FROM THE PLAINTIFFS LAST IN LIGHT OF THE TENTATIVES.

16 I DON'T -- I'M NOT GOING TO SET TIME LIMITS. AFTER ABOUT
17 AN HOUR I'M GOING TO STOP PAYING AS CLOSE ATTENTION TO YOU, SO
18 USE YOUR TIME PRODUCTIVELY.

19 WHO WANTS TO GO FIRST?

20 MS. MEJIA?

21 **MS. MEJIA:** GOOD AFTERNOON, YOUR HONOR.

22 SO, YOUR HONOR'S ABSOLUTELY CORRECT THAT THE ONLY
23 ALLEGATION WITH RESPECT TO PARALLEL CONDUCT IS THAT -- IT'S AT
24 PARAGRAPH 68 -- THAT DEFENDANTS HAVE QUOTE, "HAVE AGREED
25 GENERALLY TO REFRAIN FROM OFFERING COMPETITIVE REBATES."

1 THERE'S ABSOLUTELY NOTHING ELSE WITH RESPECT TO PARALLEL
2 CONDUCT BETWEEN -- AMONG THE DEFENDANTS.

3 THE COMPLAINT DOESN'T ALLEGE ANY INDIVIDUAL SPECIFIC
4 REBATING PRACTICE, DOESN'T PROVIDE ANY STATISTICS ABOUT THE
5 FREQUENCY OF REBATING IN THE INDUSTRY, DOESN'T ALLEGE ANY
6 AGREEMENT BETWEEN AGENTS TO REBATE ANY AGREEMENTS BETWEEN
7 SURETY AND AGENTS. IT'S ENTIRELY UNCLEAR EXACTLY THE SCOPE OF
8 THE CONSPIRACY. AND OTHER THAN THAT ALLEGATION THERE'S
9 NOTHING ELSE TO BE SAID ABOUT PARALLEL CONDUCT AMONG THE
10 DEFENDANTS.

11 AND, IN FACT, THE STATEMENTS THAT ARE HIGHLIGHTED BY THE
12 DEFENDANTS IN THEIR COMPLAINT IN OPPOSITION ACTUALLY ARE
13 INTENTIONED WITH THAT. THE STATEMENTS MAKE CLEAR THAT THERE
14 IS, IN FACT, REBATING. AND, IN FACT, THERE IS A LOT OF
15 REBATING. AND THE COMPLAINT ALSO MAKES CLEAR, AS DO THE
16 MOTION PAPERS, THAT THERE ARE OVER 3,000 AGENTS IN THE STATE
17 OF CALIFORNIA.

18 SO COORDINATING A CONSPIRACY OVER THE DECLINATION OF
19 REBATING AMONG THAT NUMBER OF DEFENDANTS SEEMS IMPLAUSIBLE AND
20 CERTAINLY DIFFICULT TO MONITOR, AND THERE'S NOTHING IN THE
21 ALLEGATION THAT ATTEMPTS TO DEAL WITH THE REALITIES OF HOW THE
22 REBATING -- ABOUT THOSE FACTS. AND THE COMPLAINT ALSO IGNORES
23 THE REALITIES OF HOW REBATING WORKS.

24 REBATING COMES FROM THE COMMISSION THAT THE AGENTS
25 RECEIVE --

1 **THE COURT:** I THINK THAT'S -- I THINK THE PLAINTIFFS
2 GET THAT. THE LANGUAGE IS A LITTLE CLUMSY, BUT I THINK THEY
3 UNDERSTAND THAT DISTINCTION.

4 **MS. MEJIA:** OKAY, YOUR HONOR.

5 BUT I WANT TO GO BACK TO THE POINT THAT THE STATEMENTS
6 THAT THEY RELY ON IN THEIR -- THE COMPLAINT MAKE CLEAR THAT
7 THERE IS COMPETITION AMONG AGENTS OVER REBATING. THERE HAS
8 BEEN AN INCREASE IN THE NUMBER OF AGENTS OVER THE COURSE OF
9 THE CONSPIRACY PERIOD WHICH SUGGESTS A VERY COMPETITIVE
10 MARKET. I THINK THERE'S -- AT ONE POINT THE NUMBER OF AGENTS
11 WENT FROM 1200 --

12 **THE COURT:** ACTUALLY, MY -- I DON'T KNOW HOW GERMANE
13 THIS IS GOING TO BE TO MY RULING, BUT MY ECONOMICS 101 WOULD
14 TELL ME THAT IF THERE'S AN INCREASE IN THE NUMBER OF AGENTS,
15 IT'S BECAUSE THERE'S HIGH PROFITS IN THE MARKET. THAT'S WHY
16 OTHER PEOPLE SEEK TO ENTER.

17 **MS. MEJIA:** BUT IT MEANS THAT IT'S A FLUID MARKET AND
18 FOLKS ARE ABLE TO ENTER QUITE EASILY. SO THAT'S A -- THAT'S
19 A --

20 **THE COURT:** THERE AREN'T BARRIERS TO ENTER.

21 **MS. MEJIA:** YES, LOW BARRIERS TO ENTRY. IF YOU HAVE
22 A LOT OF PEOPLE ENTERING AS PARTICIPANTS, THAT THAT MEANS
23 THERE'S LOW BARRIERS TO ENTRY.

24 **THE COURT:** SURE.

25 **MS. MEJIA:** SO, AGAIN, YOUR HONOR, I THINK YOU ARE

1 ABSOLUTELY RIGHT THAT THERE IS NOTHING IN THE COMPLAINT THAT
2 COMES CLOSE TO MEETING PLAINTIFFS' BURDEN ON THAT PARTICULAR
3 ALLEGATION WITH RESPECT TO THE DECLINATION OF REBATES.

4 ON A FINAL NOTE, YOUR HONOR, WE THINK IT WOULD ALSO BE
5 FUTILE ACTUALLY TO ALLOW THEM TO AMEND GIVEN THAT REBATING
6 OCCURS AND IT'S CONSISTENT -- AND THE AGENTS --

7 **THE COURT:** YOU'RE TELLING ME -- OKAY. NEVER MIND.

8 **MS. MEJIA:** GO AHEAD.

9 **THE COURT:** YOU HAVE QUITE AN UPHILL BATTLE TO TELL
10 ME THAT ON A 12(B)(6) TYPE ARGUMENT WHERE SOMEBODY HASN'T
11 ALLEGED ENOUGH OF SOMETHING THAT I SHOULD DISMISS THEIR
12 COMPLAINT OUT OF BOX WITHOUT LEAVE TO AMEND.

13 I SUPPOSE IT HAPPENS, BUT I CAN'T SAY THAT I HAVE EVER
14 DONE IT.

15 **MS. MEJIA:** IT'S CERTAINLY YOUR DISCRETION, YOUR
16 HONOR, AND I APPRECIATE THAT.

17 **THE COURT:** YEAH.

18 **MS. MEJIA:** AND IT'S TYPICALLY THE CASE THAT
19 PLAINTIFFS GET A LEAVE TO AMEND, BUT WE'RE JUST LOOKING DOWN
20 THE ROAD, PLAINTIFFS HAVE AN UPHILL BATTLE TO ALLEGE A CLAIM
21 THAT'S GOING TO SURVIVE, YOU KNOW, A CHALLENGE, ANOTHER
22 CHALLENGE TO A MOTION TO DISMISS.

23 THEY ARE SIMPLY NOT AN ALLEGATION THAT THEY CAN MAKE THAT
24 THERE WAS NO REBATING THAT TOOK PLACE. BECAUSE, IN FACT,
25 THERE WAS REBATING. THEY CANNOT MAKE THAT ALLEGATION

1 TRUTHFULLY. THEY DON'T DO IT IN THIS COMPLAINT AND THEY
2 CERTAINLY CAN'T DO IT IN ANY FUTURE COMPLAINT. THAT'S THE
3 POINT I WAS TRYING TO MAKE.

4 **THE COURT:** GOT IT.

5 **MS. MEJIA:** THAT'S IT.

6 **THE COURT:** YOU DON'T WANT TO TALK ME OUT OF SOME OF
7 THOSE OTHER ANTITRUST IMMUNITY TENTATIVES --

8 **MS. MEJIA:** THAT'S MY COLLEAGUE, MR. HAMILL. WE
9 SPLIT UP THE ARGUMENT.

10 **THE COURT:** ALL RIGHT, MR. HAMILL.

11 **MR. HAMILL:** YOUR HONOR, IS IT EASIER IF WE DO THIS
12 ALL AT ONCE AND THEN YIELD THE PODIUM? MAYBE THAT'S EASIER.

13 **THE COURT:** YES, I THINK SO. PROBABLY. BECAUSE WHO
14 KNOWS, UNLESS YOU COORDINATED WITH THE OTHER SIDE HOW THEY
15 WERE GOING TO DIVIDE UP THE ARGUMENT, WHICH YOU PROBABLY
16 HAVEN'T, IT'S PROBABLY BEST TO GET THE DEFENDANTS WHOLE BALL
17 OF WAX, AND THEN THE PLAINTIFFS, AND BACK AND FORTH LIKE THAT.

18 **MR. HAMILL:** OKAY.

19 I DIDN'T KNOW IF YOU WANTED A TENNIS MATCH OR JUST KIND OF
20 ALL AT ONCE. I DON'T WANT TO TALK YOU OUT OF MUCH OF WHAT YOU
21 SAID, I'LL DESCRIBE THEM AS THE REGULATORY DEFENSES. MOSTLY
22 WANT TO TALK YOU INTO WHY I THINK YOU WERE RIGHT, AND THEN
23 MAYBE ADD A COUPLE OF THINGS TO HOPEFULLY --

24 **THE COURT:** KEEP YOUR POWDER DRY, HONESTLY.

25 **MR. HAMILL:** OKAY.

1 **THE COURT:** IF I FEEL WEAKLY ABOUT SOMETHING, I
2 GENERALLY SAY IT. ACTUALLY I DON'T GENERALLY GIVE A TENTATIVE
3 IN THAT INSTANCE, BUT IF I DO -- IF I AM GIVING A TENTATIVE,
4 AND I'M NOT CONVINCED THOROUGHLY -- ALREADY RELATIVELY
5 THOROUGHLY CONVINCED OF MY POSITION, I'LL SAY THAT.

6 **MR. HAMILL:** RIGHT.

7 **THE COURT:** IT DOESN'T MEAN MY MIND CAN'T BE CHANGED,
8 IT JUST MEANS AS I SIT HERE NOW, I DON'T THINK I NEED
9 BOLSTERING AND IF THEY DON'T SAY ANYTHING ON THE SUBJECT YOU
10 ARE GOING TO WIN.

11 **MR. HAMILL:** I THINK THAT I NEED TO OFFER A FRIENDLY
12 AMENDMENT TO MAKE YOUR ANALYSIS COMPLETE BECAUSE I THINK YOU
13 LEFT OUT ONE THING.

14 **THE COURT:** OKAY.

15 **MR. HAMILL:** IF I MAY?

16 **THE COURT:** SURE.

17 **MR. HAMILL:** ON WHAT YOU DESCRIBED AS THE CONSPIRACY
18 TO SUBMIT MAXIMUM PREMIUMS OR MAXIMUM RATES TO THE DEPARTMENT
19 OF INSURANCE, YOU SAID THAT YOUR TENTATIVE WAS THAT IT WOULD
20 BE BARRED BY THE MCCARRAN-FERGUSON ACT. OBVIOUSLY WE AGREE
21 WITH THAT, BUT THAT'S FOR THE SHERMAN ACT CLAIM. THEY ALSO
22 HAVE A CARTWRIGHT ACT CLAIM.

23 **THE COURT:** OH, YES, THAT'S TRUE.

24 **MR. HAMILL:** SO I THINK ON THAT POINT THE OTHER
25 DEFENSES WHICH ALL DO TRULY DOVETAIL, WE HAVE TO TAKE THOSE

1 INTO ACCOUNT TO DEAL WITH THE CARTWRIGHT ACT.

2 AND ALL THESE DEFENSES FLOW FROM THE SAME SOURCES, RIGHT?
3 WHETHER WE SPEAK ABOUT THEM IN TERMS OF SECTION 1860.1 OR
4 STATE ACTION, I REALLY THINK WHEN IT COMES TO THE CARTWRIGHT
5 ACT CLAIMS AND THE UCL CLAIMS, WE ARE BEST FOCUSED ON 1860.1.
6 THAT'S THE CALIFORNIA ANALOG. AND UNDER THE MACKAY CASE,
7 THAT'S WHERE WE WANT TO LOOK. BUT THAT IS THE SOURCE THAT
8 BARS THOSE CLAIMS UNDER A PARALLEL SET OF REASONING TO THE
9 MCCARRAN-FERGUSON ACT.

10 **THE COURT:** YEAH, THAT MAKES SENSE.

11 **MR. HAMILL:** THAT WOULD COMPLETE THE PICTURE OF YOUR
12 DECISION.

13 NOW, ON WHAT YOU SAY ON THE REFUSAL TO PERMIT THE REBATING
14 AS IT'S CALLED, CANDIDLY WE WERE CURIOUS IF YOU WERE GOING TO
15 GO THERE, AND I THINK THAT THERE'S -- IT WOULD BE VERY
16 DIFFICULT FOR US TO SIT UP HERE AND TRY TO TALK TO YOU OUT OF
17 THE ANALYSIS AS TO WHERE THOSE REGULATORY DEFENSES GO.

18 BUT I WILL SAY THAT I DON'T THINK THAT THAT COMPLAINT, THE
19 ONE YOU ARE SAYING WOULD NOT BE BARRED BY THE REGULATORY
20 DEFENSES --

21 **THE COURT:** YES.

22 **MR. HAMILL:** -- THAT'S NOT THE COMPLAINT THAT'S
23 BEFORE YOU. I DID A LITTLE CRIBBING HERE TO GO THROUGH
24 ANTICIPATING THAT YOU MIGHT END UP IN YOUR ANALYSIS --

25 **THE COURT:** TELL ME WHAT YOU MEAN BY THAT.

1 **MR. HAMILL:** HERE IS WHAT I MEAN.

2 I'M LOOKING AT A COUPLE OF PARAGRAPHS AT THE BEGINNING
3 THAT SET UP THE PLAINTIFFS' COMPLAINT.

4 **THE COURT:** I HAVE A COPY OF THE COMPLAINT AT MY
5 BENCH.

6 **MR. HAMILL:** ALL RIGHT.

7 **THE COURT:** SO TELL ME WHAT YOU ARE LOOKING AT.

8 **MR. HAMILL:** LET'S HIGHLIGHT STARTING WITH
9 PARAGRAPH 6. I'M GOING TO JUMP AROUND FOR A FEW THAT START
10 BACK AND FORTH, BUT PARAGRAPH 6 IS, I THINK, THE MOST
11 ILLUSTRATIVE.

12 **THE COURT:** ALL RIGHT.

13 **MR. HAMILL:** THIS CLASS ACTION SEEKS DAMAGES FOR THE
14 HUNDREDS OF THOUSANDS OF CALIFORNIANS WHO HAVE OVERPAID FOR
15 UNLAWFULLY INFLATED BAIL BOND PREMIUMS AND INJUNCTIVE RELIEF
16 TO BRING COMPETITION INTO THIS COLLUSIVE MARKET.

17 **THE COURT:** I DIDN'T DO A GOOD JOB OF ARTICULATING
18 THIS BEFORE, BUT WHEN MS. MEJIA WAS TALKING TO ME I SAID,
19 WELL, THE LANGUAGE OF THE COMPLAINT IS A LITTLE CLUMSY. ONE
20 OF THE THINGS I MEANT IS THAT THE COMPLAINT DOESN'T DO A GOOD
21 JOB, IT DOESN'T DO A GOOD ENOUGH JOB OF MAKING IT CLEAR THE
22 DISTINCTION BETWEEN PREMIUMS AND COMMISSIONS. AND SO THAT
23 GETS THE COMPLAINT INTO TROUBLE ON REBATES.

24 I'M GOING TO SAY THAT IN A MORE EXPLICIT WAY IN WHATEVER
25 ORDER I ISSUE, AND THEN THE PLAINTIFFS ARE GOING TO FIX IT.

1 THAT'S WHAT I THINK IS GOING TO HAPPEN.

2 **MR. HAMILL:** AND MY -- THE SUBTLE POINT OF MY
3 ADVOCACY WAS TO SUGGEST TO YOU THAT IF YOU WERE GOING TO GIVE
4 LEAVE TO AMEND, THAT PERHAPS, IF I MAY BE SO BOLD, IT WOULD BE
5 A GOOD IDEA TO SUGGEST THAT THAT CLARITY WOULD NEED TO BE IN
6 AN AMENDED COMPLAINT. BECAUSE THE COMPLAINT IS TARGETED TO
7 PREMIUMS, AND I COULD GIVE YOU, AS I WAS GOING TO, ABOUT A
8 HALF A DOZEN SIMILAR CITES THAT FOCUS ON THE WORD "PREMIUMS",
9 THAT THAT WON'T WORK BECAUSE OF THE RULING THAT YOU ARE
10 ISSUING ON THOSE REGULATORY DEFENSES.

11 **THE COURT:** YEAH. I THINK, I MEAN, THERE'S LIKELY TO
12 BE A LITTLE BIT OF SQUINTING AS I'M ISSUING THAT RULING. SO I
13 CAN SEE WHAT IT IS THE COMPLAINT MEANS, IF THAT MAKES SENSE.

14 **MR. HAMILL:** FAIR ENOUGH.

15 ON THAT, YOUR HONOR, I DON'T HAVE MUCH MORE TO SAY. I
16 THINK YOU HAVE IT RIGHT ON THESE REGULATORY DEFENSES. I DO
17 THINK, THOUGH, THAT THAT AMENDED PORTION THAT WOULD BRING IN
18 THE STATE LAW ANALOGS, THE MCCARRAN-FERGUSON ACT, IS GOING TO
19 BE NECESSARY TO COMPLETE THE PICTURE. BECAUSE WITHOUT THAT,
20 YOUR DECISION WOULD ONLY GET RID OF THEM -- THE FEDERAL LAW
21 CLAIMS --

22 **THE COURT:** THAT WAS HELPFUL. GOOD.

23 **MR. HAMILL:** VERY GOOD.

24 **THE COURT:** THANKS.

25 **MR. HAMILL:** THANK YOU.

1 **MS. HEALY:** GOOD AFTERNOON, YOUR HONOR. THIS IS THE
2 THIRD AT BAT HERE FOR DEFENDANTS.

3 I WANT TO ADDRESS WHAT THE COURT CALLED THE 12(B)(6)
4 ISSUES. WE APPRECIATE AND AGREE WITH THE COURT THAT THE
5 CLAIMS SHOULD BE DISMISSED AS TO THE SURETIES FOR WHOM THERE
6 IS ABSOLUTELY NO ALLEGATION OF ANY ACTIVITY ON.

7 THE COURT ALSO MENTIONED THE --

8 **THE COURT:** WOULD YOU STATE YOUR APPEARANCE AGAIN?

9 **MS. HEALY:** I'M SORRY. NICOLE HEALY.

10 **THE COURT:** THANK YOU. I HAVE IT NOW.

11 **MS. HEALY:** THANK YOU, YOUR HONOR.

12 ALL-PRO AS WELL. WE HAVE PUT IN THE SAME CATEGORY
13 LEXINGTON, WHICH IS THE 18TH OF THE SURETIES. THE COURT
14 MENTIONED GSBAA, BUT NOT THE TWO OTHER ENTITIES. IT'S THE
15 CBAA, CALIFORNIA BAIL AGENTS ASSOCIATION AND AMERICAN BAIL
16 COALITION. AND THEY REALLY ARE ALSO IN THE SAME CATEGORY WITH
17 GSBAA, WHICH IS THERE ARE EFFECTIVELY NO ALLEGATIONS OF ANY
18 ACTIVITY EXCEPT HOLDING MEETINGS.

19 CBAA IS ALLEGED TO HAVE PUT SOME INFORMATION ON ITS
20 WEBSITE, BUT NOT TO HAVE DISCLOSED THAT REBATING WAS POSSIBLE
21 BY BAIL AGENTS. THERE'S NO AFFIRMATIVE OBLIGATION THAT THEY
22 DO SO. THE INFORMATION THEY PUT ON THEIR WEBSITE APPEARS TO
23 BE ACCURATE, OR ALLEGEDLY PUT ON THEIR WEBSITE.

24 AND AS FAR AS ABC, OR AMERICAN BAIL COALITION IS
25 CONCERNED, THEY PUT ON A MEETING AND IT WAS ATTENDED BY

1 PEOPLE. AND WE DON'T HAVE ANY OTHER ALLEGATIONS ABOUT ANY
2 ACTIVITY AT THE MEETING. THERE'S NO ALLEGED AGREEMENTS MADE
3 THERE, AGREEMENTS CARRIED OUT, ALLEGED ENFORCEMENT ACTIVITY,
4 SHARING OF ILLICIT INFORMATION. NONE OF THAT, WHICH IS WHAT
5 ONE WOULD EXPECT TO SEE IN A CASE ALLEGING THAT AN
6 ORGANIZATION, AN INDUSTRY TRADE ORGANIZATION THAT WAS BEING
7 USED FOR THE ILLICIT ACTIVITY. SO I WOULD ASK THE COURT TO
8 PUT ALL THREE OF THE ASSOCIATIONS IN THE SAME CATEGORY OF
9 PARTIES TO BE DISMISSED.

10 AND WITH RESPECT TO THE TWO INDIVIDUALS, I THINK THE COURT
11 SAID THAT YOU WERE ON THE FENCE ABOUT HOW TO TREAT THE
12 INDIVIDUALS. I WOULD NOTE, THESE TWO PEOPLE AS INDIVIDUALS
13 ARE NOT IN THE -- THEY HAVE NO ABILITY TO ENFORCE ANY ILLICIT
14 ACTIVITY. THEY DON'T PERSONALLY FILE FOR ANY PREMIUMS. THEY
15 DON'T PERSONALLY ISSUE REBATES. THEY DON'T WRITE BAIL BONDS
16 PERSONALLY. THEY ARE EXECUTIVES IN THE INDUSTRY, BUT THAT'S
17 TRUE OF A LOT OF PEOPLE, AND YET THESE TWO GUYS,
18 MR. CARMICHAEL AND MR. WATSON HAVE BEEN CALLED OUT REALLY FOR
19 MAKING STATEMENTS ON THEIR COMPANY WEBSITES OR IN OTHER FORA
20 WHICH ARE NOT ABOUT ANY ILLICIT ACTIVITY.

21 MR. CARMICHAEL IS ALLEGED TO HAVE MADE STATEMENTS ON TWO
22 OCCASIONS, MARCH 2005, AUGUST 2005. AND WHAT HE'S TALKING
23 ABOUT, IF YOU READ THOSE, AND THOSE ARE EXHIBITS 3 AND
24 EXHIBIT 5 IN THE PLAINTIFFS' MATERIALS THAT THEY HAVE ATTACHED
25 IN THEIR REQUEST FOR JUDICIAL NOTICE.

1 MR. CARMICHAEL IS TALKING ABOUT LEGISLATION. AND IT'S
2 LEGISLATION THAT COULD AFFECT THE BAIL INDUSTRY. AND HE IS A
3 PERSON VERY INTERESTED IN THE BAIL INDUSTRY, AN EXECUTIVE IN
4 THE BAIL INDUSTRY -- I'M SORRY, IT'S EXHIBIT 1, THE MARCH 2005
5 ARTICLE.

6 AND HE SAYS, EFFECTIVELY, IF YOU HEAR ABOUT LEGISLATION,
7 TELL US. YOU KNOW, LET'S TALK ABOUT IT. LET'S SEE WHAT WE
8 CAN DO FOR THE INDUSTRY.

9 HE'S NOT SAYING, I WANT YOU, BAIL AGENTS OUT THERE, TO
10 REFUSE TO REBATE, TO TELL PEOPLE YOU CAN'T REBATE, TO CONSPIRE
11 NOT TO REBATE. HE'S NOT DOING ANY OF THAT.

12 HE'S ALSO TALKING ABOUT THE FINANCIAL IMPACT ON THE
13 INDUSTRY OF REBATING. THIS IS SOMETHING OF GREAT CONCERN TO
14 THE SURETIES. BECAUSE, AS THE COURT UNDERSTANDS, IT'S THE
15 BAIL AGENT WHO IS THE FRONT LINE WHO ISSUES THE BOND. AND IF
16 THE ARRESTEE SKIPS BAIL, THE BAIL AGENT IS GOING TO PAY. SO
17 THE BAIL AGENT'S FINANCIAL SOLVENCY IS EXTREMELY IMPORTANT.

18 THE SURETY STANDS BEHIND THE BAIL AGENT. THE SURETY GETS
19 ITS 1 PERCENT OF THE FACE VALUE OF THE BOND, AND IF THE BAIL
20 AGENT IS INCAPABLE OF SATISFYING THE BOND, IT'S THE SURETY WHO
21 STEPS IN.

22 AND SO TO THAT DEGREE, BECAUSE THE SURETY IS ADVANCING
23 CREDIT TO THE BAIL AGENT, THE SURETY'S CONCERNED ABOUT THE
24 FINANCIAL WHEREWITHAL OF BAIL AGENTS. THAT'S WHAT HE'S
25 TALKING ABOUT.

1 **THE COURT:** OKAY. I DO HAVE TO CONSTRUE THESE
2 ALLEGATIONS FAVORABLY TO THE PLAINTIFF. THAT WASN'T BAD AS A
3 DEFENSIVE PROFIT, THE THING THAT YOU JUST SAID, BUT... YEAH.

4 **MS. HEALY:** YOUR HONOR, I WOULD SUGGEST THAT YOU
5 RE-READ EXHIBIT 1 AND EXHIBIT 5 IN PLAINTIFFS' MATERIALS.

6 **THE COURT:** I ACCEPT THAT INVITATION. I ACTUALLY
7 WILL READ THE EXHIBITS THEMSELVES. YOU DID A GOOD JOB OF, I
8 THINK, DIRECTING MY ATTENTION TO THOSE.

9 **MS. HEALY:** WITH RESPECT TO MR. WATSON, WHO IS
10 ALLEGED TO HAVE MADE STATEMENTS AS WELL, WHAT HE SAYS IS, YOU
11 KNOW, IF WE ARE GOING TO BE COMPETING WITH PEOPLE WHO ARE
12 REBATING, HERE'S HOW WE COMPETE: WE OFFER BETTER SERVICE,
13 WHICH IS EXACTLY WHAT YOU WANT PEOPLE TO DO, COMPETE ON
14 QUALITY.

15 OTHER PEOPLE CAN DISCOUNT ON PRICE. YOU ARE GOING TO
16 COMPETE ON QUALITY. IF YOU ARE THE BETTER QUALITY BAIL AGENT,
17 THE ONE WITH BETTER SERVICE, PEOPLE WANT TO GO WORK WITH, YOU
18 ARE GOING TO GET CUSTOMERS. SO THAT'S WHAT HE'S TALKING
19 ABOUT, WHICH IS NOT ANTICOMPETITIVE IN THE LEAST. IN FACT, IT
20 IS PROCOMPETITIVE.

21 SO I WOULD SUGGEST THE COURT CONSIDER THIS IN THINKING
22 ABOUT THE INDIVIDUALS WITH RESPECT TO ANY DISMISSAL AND THE
23 FUTURE COMPLAINT.

24 **THE COURT:** VERY GOOD.

25 **MS. HEALY:** THANK YOU, YOUR HONOR.

1 **THE COURT:** THANK YOU.

2 **MS. HEALY:** FINALLY, JUST TO POINT OUT FOR DANIELSON,
3 DANIELSON EXITED THE BUSINESS YEARS AGO. THEY AREN'T WRITING
4 BAIL. THEY ARE NO LONGER IN THIS BUSINESS. THE CLAIMS SHOULD
5 BE DISMISSED AS TO THEM.

6 THANK YOU, YOUR HONOR.

7 **THE COURT:** THANKS.

8 **MR. CIESLAK:** GOOD AFTERNOON, YOUR HONOR. JON
9 CIESLAK FROM COOLEY ON BEHALF SEAVIEW AND TWO JINN.

10 I AM GOING TO ADDRESS SOMETHING THAT ACTUALLY LEADS FROM
11 MS. HEALY'S LAST POINT ABOUT DANIELSON, AND THAT'S THE STATUTE
12 OF LIMITATIONS. THE COURT HASN'T GIVEN US ANY GUIDANCE, BUT I
13 WANTED TO BEGIN BY DIRECTING THE COURT TO THE VERY FIRST
14 SENTENCE OF THE PLAINTIFFS' OPPOSITION BRIEF ON THIS MOTION.

15 AND THAT IS POINTING TO A STATEMENT FROM WILLIAM
16 CARMICHAEL IN 2005 WHICH, AS PLAINTIFFS SAY, HE DESCRIBES THE
17 ALLEGED CONSPIRACY. PLAINTIFFS THEN GO ON TO ALLEGE OR TRY TO
18 ALLEGE THAT THE PLAINTIFFS THEN FRAUDULENTLY CONCEALED THE
19 CONSPIRACY, SOME -- STARTING SOMETIME AFTER 2005 UNTIL THE
20 PRESENT.

21 **THE COURT:** RIGHT.

22 **MR. CIESLAK:** I THINK THOSE ALLEGATIONS ARE JUST
23 INHERENTLY IN CONFLICT, AND PLAINTIFFS CAN'T HAVE IT BOTH
24 WAYS.

25 WHEN THEY TRY TO -- I'M SORRY, WERE YOU GOING --

1 **THE COURT:** OH, NO. IT'S FUNNY. YOU KNOW, EVEN
2 AFTER 18 YEARS I HAVEN'T GOTTEN USED TO THE WEIGHT THAT PEOPLE
3 PUT ON EACH MOVEMENT OF ANY OF MY FACIAL MUSCLES.

4 (LAUGHTER)

5 SO I DON'T EVEN KNOW HOW TO ANSWER THE QUESTION THAT YOU
6 ARE BINDING UP TO ASK. I JUST WENT LIKE THIS (INDICATING) --

7 **MR. CIESLAK:** I THOUGHT YOU WERE ABOUT TO SAY
8 SOMETHING, AND I WAS GOING TO ALLOW YOU TO DO THAT.

9 **THE COURT:** NO, I APPRECIATE THAT. AND I'M HONESTLY
10 NOT, I'M NOT MAKING FUN OF YOU. I'M MAKING FUN OF MYSELF AND
11 THE ROLE THAT I HAVE TO PLAY, AND I THOUGHT I MIGHT GET A
12 LAUGH FROM THE AUDIENCE, AND I DID.

13 ANYWAY, GO AHEAD.

14 **MR. CIESLAK:** THANK YOU.

15 SO HAVING ALLEGED THAT, YOU KNOW, A DEFENDANT PUBLICLY
16 DESCRIBED THEIR ALLEGED CONSPIRACY IN 2005, IN, YOU KNOW,
17 PLAINTIFFS THEN GO ON TO ALLEGE THAT, YOU KNOW, DEFENDANTS
18 SOMEHOW CONCEALED THAT CONSPIRACY, THEIR CORE THEORY HERE IS
19 THAT THERE WERE A NUMBER OF MISREPRESENTATIONS THAT PREMIUM
20 PRICES WERE REQUIRED BY LAW AND THAT DISCOUNTING WAS ILLEGAL.
21 AND THEY CITE EITHER A NUMBER OF STATEMENTS IN THE COMPLAINT.

22 **THE COURT:** WE DON'T NORMALLY DUMP, I DON'T SAY "WE".
23 IT ISN'T COMMONLY DONE TO DISMISS THESE KIND OF CLAIMS AT THE
24 12(B) (6) STAGE BECAUSE QUESTIONS OF FRAUDULENT CONCEALMENT ARE
25 INHERENTLY FACTUAL. I DON'T DENY THAT THERE COULD POTENTIALLY

1 BE SUCH A PLAUSIBILITY PROBLEM THAT THE COURT WOULD GRANT A
2 MOTION TO DISMISS ON THOSE GROUNDS, BUT I DON'T KNOW THAT
3 YOU'RE QUITE -- THAT THIS CASE IS THAT CASE.

4 **MR. CIESLAK:** I HEAR THAT. AND WE DO HAVE A CITATION
5 HERE. IT'S THE *JABLON VERSUS DEAN WITTER* CASE THAT SAYS THAT
6 THIS IS, WHEN IT'S APPARENT FROM THE FACE OF THE COMPLAINT
7 THAT THESE CLAIMS ARE TIME BARRED, THEN YOU CAN GRANT THE
8 MOTION TO DISMISS.

9 BUT I THINK THIS IS THAT CASE BECAUSE OF THE EMPHASIS THAT
10 PLAINTIFFS THEMSELVES PUT ON THIS STATEMENT FROM 2005. YOU
11 CAN'T BE BOTH DEFENDANTS WERE PUBLICLY DESCRIBING A CONSPIRACY
12 AND AT THE SAME TIME CONCEALING IT.

13 SO I GUESS THE ASK IS CERTAINLY THAT, YOU KNOW, ANOTHER
14 GROUND TO DISMISS THIS COMPLAINT WOULD BE THE STATUTE OF
15 LIMITATIONS, BUT I THINK BOTH PARTIES WOULD CERTAINLY BENEFIT
16 FROM GUIDANCE THE COURT COULD GIVE ON THIS ISSUE.

17 **THE COURT:** SO YOU'VE READ THE GITLIN DECLARATION,
18 EXHIBIT 1, FROM WHICH THIS QUOTE IS TAKEN?

19 **MR. CIESLAK:** YES.

20 **THE COURT:** WHICH IS THE EXHIBIT THAT I ACCEPTED THE
21 INVITATION TO READ A MOMENT AGO. WHERE WAS THE STATEMENT
22 MADE? WHERE WAS WILLIAM B. CARMICHAEL STANDING OR SITTING
23 WHEN HE MADE THIS STATEMENT?

24 **MR. CIESLAK:** IT WAS A WRITTEN STATEMENT THAT WAS
25 PUBLISHED ON A WEBSITE. AND I AM NOT RECALLING EXACTLY WHICH

1 SURETY DEFENDANT'S WEBSITE IT WAS. IT WAS PUBLICLY AVAILABLE
2 ON THAT WEBSITE.

3 **THE COURT:** I SEE.

4 **MR. CIESLAK:** HIS BLOG THAT WAS ON THE WEBSITE.

5 **THE COURT:** I MEAN THE ARGUMENT REQUIRES THE COURT TO
6 CONSIDER WHAT IT MEANS TO SAY SOMETHING PUBLICLY. AND SO WE
7 MIGHT SAY, YOU KNOW, THERE ARE DIFFERENT LEVELS. IF HE SAID
8 IT TO HIS COLLEAGUE IN HIS OFFICE, THAT WOULD BE AT A VERY LOW
9 LEVEL. IF HE SAID IT ON THE CNN WEBSITE, THAT WOULD BE VERY
10 PUBLIC.

11 IS THE BLOG MAINTAINED BY A SURETY COMPANY? WHERE DOES
12 THAT FIT IN? THAT IS SOMETHING I'LL HAVE TO CONSIDER.

13 **MR. CIESLAK:** YOUR HONOR, I THINK THAT'S NOT EXACTLY
14 THE RIGHT QUESTION ACTUALLY. IT IS ON PLAINTIFFS. IT IS
15 THEIR BURDEN TO PLEAD FACTS SHOWING FRAUDULENT CONCEALMENT.

16 **THE COURT:** YES.

17 **MR. CIESLAK:** AND WHETHER OR NOT THIS IS A COMMONLY
18 REVIEWED WEBSITE DOESN'T REALLY GO TO THAT. AND --

19 **THE COURT:** BUT HOW CAN I -- I CAN'T ACCEPT YOUR
20 ARGUMENT WITHOUT ANY CONTEXT, CAN I? I CAN'T SAY, WELL, HE
21 SAID IT PUBLICLY, BUT DON'T CONSIDER WHAT KIND OF WEBSITE IT
22 WAS.

23 **MR. CIESLAK:** RIGHT, BUT THE POINT BEING, YOUR HONOR,
24 THAT IT IS NOT CONCEALMENT FOR HIM TO GO ON TO A WEBSITE NO
25 MATTER THE POINT IS.

1 **THE COURT:** YES. THAT WAS NOT AN ACT OF CONCEALMENT.

2 **MR. CIESLAK:** RIGHT.

3 **THE COURT:** YES.

4 **MR. CIESLAK:** SO IN LIGHT OF THAT, I MEAN WHAT ACTS
5 OF CONCEALMENT ARE THERE IN THE COMPLAINT? AND I WOULD REPORT
6 TO YOU THAT THEIR THEORY HERE IS THAT IT IS MISREPRESENTATIONS
7 ABOUT WHETHER REBATING IS ILLEGAL AND -- OR AS THEY SAY,
8 DISCOUNTING IS ILLEGAL.

9 NOW, THERE ARE A NUMBER OF STATEMENTS FROM VARIOUS BAIL
10 AGENTS WHERE THEY SAY THAT THAT'S WHAT THOSE BAIL AGENTS ARE
11 SAYING. I WANT TO NOTE THAT ALL BUT ONE OF THOSE ARE FROM A
12 BAIL AGENT THAT IS NOT A DEFENDANT IN THIS CASE.

13 **THE COURT:** YES.

14 **MR. CIESLAK:** THERE'S REALLY NO BASIS IN THE
15 COMPLAINT OR OTHERWISE TO ATTRIBUTE THOSE STATEMENTS TO ANY OF
16 THOSE DEFENDANTS.

17 THE ONE EXCEPTION IS AT PARAGRAPH 73. AND THAT'S A
18 STATEMENT BY MY CLIENT, TWO JINN, WHICH DOES BUSINESS AS
19 ALADDIN BAIL BONDS.

20 AND THEN THE STATEMENT THAT THEY HAVE HERE, IF I COULD,
21 I'LL READ IT. IT'S, "ALL INSURERS WHO WORK WITH BAIL SERVICE
22 PROVIDERS ARE REQUIRED TO FILE THEIR PREMIUM RATES WITH THE
23 DEPARTMENT OF INSURANCE. IN CALIFORNIA, ALADDIN BAIL BONDS IS
24 AUTHORIZED TO OFFER AN 8 PERCENT RATE IN ADDITION TO THE
25 STANDARD 10 PERCENT RATE. NOBODY HAS LOWER PRICES THAN

1 ALADDIN."

2 THAT'S THE ONLY STATEMENT THAT HAS BEEN ATTRIBUTED TO A
3 DEFENDANT THAT WOULD IN ANY WAY FRAUDULENTLY CONCEAL THIS.
4 AND I WOULD PUT TO YOU, THE COURT, IN FACT, IT DOES NOT
5 FRAUDULENTLY CONCEAL ANYTHING. PLAINTIFFS' THEORY IS THAT
6 THIS STATEMENT -- THEY DON'T SAY IT'S FALSE AND, IN FACT, IT
7 IS NOT FALSE. THEY SAY IT IS MISLEADING BECAUSE IT DOESN'T
8 ALSO SAY, BUT WE CAN ALSO GIVE YOU A REBATE ON THAT. AND --

9 **THE COURT:** YOU THINK THE USE OF THE WORD
10 "AUTHORIZED" WAS NOT -- THAT SOMEONE DID NOT SELECT THAT WORD
11 ADVISEDLY TO CONVEY A CERTAIN MEANING WHICH MIGHT NOT ACTUALLY
12 CAPTURE THE TRUTH IN ITS ENTIRETY?

13 **MR. CIESLAK:** WELL... BUT, NO, I DON'T THINK THAT'S
14 THE CASE. AND THE REASON IS THAT WE NEED TO UNDERSTAND THE
15 STRUCTURE OF THE BAIL INDUSTRY HERE WHERE THERE'S TWO PLAYERS.
16 THERE'S THE SURETY AND THEN THERE'S THE BAIL AGENT.

17 SO THE BAIL AGENT DOESN'T FILE RATES. AND IT CAN ONLY
18 CHARGE THE RATES THAT A SURETY HAS FILED AND HAS BEEN APPROVED
19 BY THE CALIFORNIA DEPARTMENT OF INSURANCE.

20 SO WHEN ALADDIN IS SAYING WE WERE AUTHORIZED TO OFFER
21 THESE RATES, THEY WERE AUTHORIZED TO OFFER THOSE RATES BY THE
22 SURETY THAT IS STANDING BEHIND THEM.

23 **THE COURT:** YES. ALL RIGHT.

24 **MR. CIESLAK:** BUT THE CENTRAL POINT HERE --

25 **THE COURT:** HAVE YOU EVER BEEN TO A BAIL BONDSMAN?

1 **MR. CIESLAK:** I HAVE TALKED WITH A NUMBER OF BAIL
2 BONDSMEN. I HAVE ONLY DONE CRIMINAL MATTERS IN FEDERAL COURT
3 WHERE WE DON'T HAVE TO USE BAIL BONDSMEN.

4 **THE COURT:** HAVE YOU GONE DOWN TO THE COURTROOM ON
5 WASHINGTON STREET AND WALKED ACROSS THE STREET AND WALKED IN
6 AND OUT OF THE OFFICES AND LOOKED AT THE KINDS OF PEOPLE WHO
7 COME INTO THE OFFICE TO PURCHASE BAIL BONDS?

8 **MR. CIESLAK:** I HAVE NOT DONE THAT, YOUR HONOR.

9 **THE COURT:** WHAT WE MIGHT DESCRIBE IN THIS INDUSTRY
10 AS THE REASONABLE CONSUMER, THAT PERSON.

11 **MR. CIESLAK:** I'VE REPRESENTED SEVERAL OF THEM IN
12 FEDERAL COURT.

13 **THE COURT:** THE ORDER ISN'T PROBABLY GOING TO TOUCH
14 ON THE DISCUSSION THAT WE ARE HAVING RIGHT NOW ABOUT PARAGRAPH
15 73, BUT I SPENT A YEAR AT THE WILEY MANUEL COURTHOUSE. IT WAS
16 MY VERY FIRST JOB ON THE STATE COURT. AND OF COURSE I HAD
17 SPENT A YEAR AND A HALF AS A PUBLIC DEFENDER SEVERAL YEARS
18 BEFORE THAT.

19 **MR. CIESLAK:** YES.

20 **THE COURT:** AND SO WHEN I THINK ABOUT THE SENTENCE
21 "ALADDIN BAIL BONDS IS AUTHORIZED TO OFFER AN 8 PERCENT RATE
22 IN ADDITION TO THE STANDARD 10 PERCENT, NOBODY HAS LOWER
23 PRICES THAN ALADDIN," CAN I EXCLUDE THE POSSIBILITY THAT A
24 REASONABLE CONSUMER OF BAIL BOND SERVICES WOULD READ THAT
25 PHRASE AND THINK TO THEMSELVES, WELL, 8 PERCENT, THAT MUST BE

1 THE ABSOLUTE ROCK BOTTOM. IF I'M GETTING 8 PERCENT, I AM
2 GETTING AS GOOD AS ANYBODY COULD POSSIBLY GET. IT WOULD BE
3 TOUGH FOR ME TO EXCLUDE THAT POSSIBILITY.

4 THAT'S THE ONLY POINT I'M MAKING.

5 **MR. CIESLAK:** I UNDERSTAND THAT POINT.

6 I DON'T THINK THAT'S WHAT'S REQUIRED TO FIND THAT
7 PLAINTIFF -- THAT DEFENDANTS HAVE NOT FRAUDULENTLY CONCEALED.

8 **THE COURT:** I AGREE WITH YOU. THE CASE IS NOT GOING
9 TO RISE AND FALL ON THIS PARAGRAPH. IT'S JUST THE THING YOU
10 ARE SERVING UP TO ME.

11 **MR. CIESLAK:** I UNDERSTAND. AND MY POINT IS THAT
12 THIS IS THE ONLY THING PLAINTIFFS CAN SERVE UP TO YOU, AND
13 IT'S NOT ENOUGH TO ACHIEVE FRAUDULENT CONCEALMENT.

14 **THE COURT:** THANKS.

15 **MR. CIESLAK:** THANK YOU, YOUR HONOR.

16 **MR. HAMILL:** YOUR HONOR, BEFORE WE YIELD THE FLOOR?

17 **THE COURT:** YES.

18 **MR. HAMILL:** WE MAY HAVE MISHEARD ONE ASPECT OF YOUR
19 TENTATIVE. CAN I JUST CLARIFY ONE QUESTION? ASK YOU ONE
20 QUESTION?

21 **THE COURT:** SURE.

22 **MR. HAMILL:** ON THE MCCARRAN-FERGUSON ACT, WAS YOUR
23 TENTATIVE THAT THE REFUSAL TO PERMIT REBATES WOULD NOT BE
24 BARRED BY THE MCCARRAN-FERGUSON ACT?

25 **THE COURT:** YES.

1 **MR. HAMILL:** OKAY. MAY I ASK YOU FOR TWO MINUTES TO
2 TRY AND TALK YOU OUT OF THAT?

3 **THE COURT:** SURE.

4 **MR. HAMILL:** BECAUSE I THINK THAT'S INCORRECT.

5 **THE COURT:** AFTER THAT IS IT THE PLAINTIFFS' TURN?

6 **MS. MEJIA:** YES, YOUR HONOR.

7 **MR. HAMILL:** YES, SIR.

8 **THE COURT:** GO AHEAD.

9 **MR. HAMILL:** SO AS WE LAID OUT IN THE BRIEFS, IF I
10 CAN EXPAND ON THAT A BIT MORE, THE BUSINESS OF INSURANCE
11 INCLUDES THAT RELATIONSHIP BETWEEN THE AGENT AND THE PURCHASER
12 OF A BOND. AND IF I CAN DIRECT YOUR ATTENTION, THE ONLY
13 AUTHORITIES THAT HAVE BEEN CITED TO YOU THAT I AM AWARE OF ALL
14 SUPPORT WHAT I JUST SAID.

15 THE THINGS WE WOULD ASK YOU TO CONSIDER ARE, FIRST OF ALL,
16 THE *GROVES* CASE FROM THE SUPREME COURT OF CALIFORNIA, WHICH
17 ESSENTIALLY HOLDS THAT A CITY CAN'T COLLECT A LICENSE TAX ON
18 BAIL AGENTS BECAUSE THAT RELATIONSHIP THAT THE BAIL AGENT'S
19 BUSINESS IS, IN FACT, THE BUSINESS OF INSURANCE. THAT'S THE
20 FIRST THING I WOULD ASK YOU TO LOOK AT.

21 **THE COURT:** OKAY. THERE ARE THREE FACTORS IN
22 DETERMINING WHETHER SOMETHING IS THE BUSINESS OF INSURANCE,
23 RIGHT?

24 **MR. HAMILL:** YES.

25 **THE COURT:** THE FIRST IS WHETHER THE PRACTICE HAS THE

1 EFFECT OF TRANSFERRING OR SPREADING THE POLICYHOLDER'S RISKS.

2 HOW DOES THE REBATING FIT IN THERE?

3 **MR. HAMILL:** I AM NOT SURE WHERE YOU ARE GETTING THAT
4 FROM, YOUR HONOR, THAT THAT'S WHAT CONSTITUTES THE BUSINESS OF
5 INSURANCE.

6 **THE COURT:** THE CASE FROM THE NINTH CIRCUIT CALLED
7 *FEINSTEIN*.

8 **MR. HAMILL:** THE QUESTION OF WHAT GOES -- COVERS THE
9 BUSINESS OF INSURANCE IS A QUESTION OF WHAT THE SCOPE OF THE
10 STATE REGULATION IS. THE STATE REGULATION IS GOVERNED BY
11 STATE LAW. STATE LAW COVERED THIS RELATIONSHIP BETWEEN THE
12 BAIL AGENT AND THE PURCHASER.

13 SO THE BAIL AGENT HERE IS THE PERSON THAT IS ULTIMATELY
14 PROVIDING BAIL TO THE PURCHASER, THE BOND TO THE PURCHASER.
15 THAT RELATIONSHIP IS GOVERNED BY STATE LAW. THE CALIFORNIA
16 SUPREME COURT HAS SPOKEN AND SAID THAT RELATIONSHIP IS
17 GOVERNED BY THE CALIFORNIA INSURANCE CODE.

18 SO FOR THE FEDERAL ANTITRUST LAW TO COME IN AND INVADE
19 THAT RELATIONSHIP AND IMPOSE THE SHERMAN ACT'S RESTRICTIONS ON
20 IT WOULD BE A CHANGE IN THAT RELATIONSHIP PUTTING IT SUBJECT
21 TO FEDERAL ANTITRUST RESTRICTIONS, WHICH WOULD BE A FIRST.
22 THE FEDERAL COURTS HAVE CONSIDERED THIS QUESTION AND LOOKED AT
23 THAT VERY RELATIONSHIP --

24 **THE COURT:** IF YOU ARE CORRECT, YOU'RE RIGHT, YOU ARE
25 DOING ME A HUGE FAVOR. THIS CASE MIGHT GO ON FOR A LONG TIME.

1 I DON'T KNOW.

2 MR. HAMILL: IT COULD.

3 THE COURT: THEN YOU AND I WILL HAVE LOTS OF
4 OPPORTUNITY TO INTERACT. SO I'M GOING TO ASK YOU A QUESTION.

5 MR. HAMILL: YES.

6 THE COURT: IF I READ -- IF I AM THIS WRONG, IT MUST
7 BE THAT I CAN READ ONE CASE AND SEE HOW WRONG I AM.

8 WHAT'S THE CASE?

9 MR. HAMILL: SOUTHERN DISTRICT OF FLORIDA, *BUCKMAN V.*
10 *AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA* 924 F.SUPP.
11 1156. THAT'S WHAT I WOULD ASK YOU TO READ.

12 THE COURT: NOW, OF COURSE I HAVE NOTHING BUT RESPECT
13 FOR ALL OF THE FEDERAL DISTRICTS AROUND THE COUNTRY. I DO
14 WONDER IF I'M SO WRONG AND IF THE POINT IS SO
15 WELL-ESTABLISHED, WHY DO I HAVE TO GO TO THE SOUTHERN DISTRICT
16 OF FLORIDA? IS THERE SOMETHING CLOSER TO HOME?

17 MR. HAMILL: IT HAS BETTER WEATHER THAN YOU DO.

18 THE COURT: YOU'RE ON THIN ICE.

19 MR. HAMILL: SUPREME COURT OF CALIFORNIA. THAT'S THE
20 BEST I CAN DO, IN *GROVES*.

21 THE COURT: *GROVES*, 1953. I'LL READ IT.

22 MR. HAMILL: THAT'S IT.

23 THE COURT: OKAY.

24 MR. HAMILL: THANKS, JUDGE.

25 THE COURT: THANKS.

1 **MR. HARVEY:** GOOD AFTERNOON, YOUR HONOR. I THINK IT
2 MAY MAKE SENSE TO GIVE A BIT OF BACKGROUND ON THE PERHAPS
3 UNIQUE WAY THAT CALIFORNIA APPLIES COMPETITION TO THE
4 INSURANCE INDUSTRY.

5 AND I WANT TO DESCRIBE PROPOSITION 103 AND THE SEA CHANGE
6 THAT IT WORKED ON THE APPLICATION OF ANTITRUST LAWS TO
7 INSURANCE. WHICH I'LL JUST SAY TO BEGIN WITH, FOR YOUR
8 HONOR'S REFERENCE, ATTACHED AS EXHIBIT 7 TO THE GITLIN
9 DECLARATION, IS THE CALIFORNIA ATTORNEY GENERAL GUIDELINES
10 TO -- OF HOW TO APPLY THE ANTITRUST LAWS IN THE INSURANCE
11 CONTEXT.

12 AND THOSE GUIDELINES RESPOND ALMOST POINT BY POINT TO
13 EVERY ARGUMENT WE JUST HEARD BY DEFENDANTS. AND THERE IS A
14 SEPARATE SECTION FOR MCCARRAN-FERGUSON, FOR EXAMPLE, SEPARATE
15 SECTION FOR THE FILED RATE DOCTRINE, SO ON AND SO FORTH. I
16 WILL WALK THROUGH THE COURT -- I WILL WALK THE COURT THROUGH
17 SOME OF THESE ISSUES.

18 I'LL ALSO ADD THAT THESE GUIDELINES ARE ENTITLED TO GREAT
19 WEIGHT UNDER CALIFORNIA COURT OF APPEAL AUTHORITY, INCLUDING
20 THE *CRAMER* CASE AND THE CALIFORNIA SUPREME COURT WHICH IS
21 *CALIFORNIA ASSOCIATION OF PSYCHOLOGY PROVIDERS*, 51 CAL.3D 1,
22 AT PAGE 11, 1990. AND ONE -- IF I CAN --

23 **THE COURT:** THIS IS *CALIFORNIA ASSOCIATION* OF WHAT?

24 **MR. HARVEY:** *OF PSYCHOLOGY PROVIDERS*.

25 **THE COURT:** SO THIS IS A NEW CASE, CORRECT?

1 **MR. HARVEY:** THIS IS A NEW CASE.

2 **THE COURT:** IT'S NOT IN THE BRIEF.

3 **MR. HARVEY:** IT'S NOT.

4 **THE COURT:** YOU'RE CITING IT FOR THE PROPOSITION THAT
5 I SHOULD GIVE A LOT OF WEIGHT TO THESE GUIDELINES THAT ARE IN
6 EXHIBIT 7?

7 **MR. HARVEY:** CORRECT.

8 **THE COURT:** GIVE ME THE CITATION AGAIN?

9 **MR. HARVEY:** 51 CAL.3D 1 AT PAGE 11.

10 **THE COURT:** ALL RIGHT.

11 **MR. HARVEY:** AND ONE LAST POINT ON THIS. BECAUSE THE
12 DEFENDANTS IN THEIR OPPOSITION TO OUR MOTION FOR JUDICIAL
13 NOTICE I THINK CASTS SOME DOUBT ON WHETHER THE GUIDELINES
14 WE'VE PROVIDED TO THE COURT ARE AUTHENTIC, WITH YOUR HONOR'S
15 PERMISSION --

16 **THE COURT:** THERE'S ALSO A FIGHT THAT I DIDN'T FINISH
17 RESOLVING IN MY OWN MIND BECAUSE I DIDN'T DO THE HOMEWORK YET
18 ABOUT WHETHER I SHOULD GIVE JUDICIAL NOTICE TO SOME CALIFORNIA
19 DEPARTMENT OF INSURANCE MATERIALS BECAUSE THEY MIGHT BE OUT OF
20 DATE. ISN'T THAT A FIGHT YOU'RE HAVING ON JUDICIAL NOTICE?

21 **MR. HARVEY:** THAT IS NOT AN ARGUMENT THAT THE
22 DEFENDANTS MADE, BUT I WOULD BE HAPPY TO ADDRESS THAT CONCERN.

23 **THE COURT:** NO, NO, NO. GO AHEAD.

24 **MR. HARVEY:** WITH YOUR HONOR'S PERMISSION, I WOULD
25 LIKE TO PASS OUT A DOCUMENT THAT SIMPLY SUMMARIZES THE CALL

1 NUMBERS OF THE GUIDELINES IN EVERY LOCAL LAW LIBRARY AS WELL
2 AS PROVIDING A CITATION TO A CASE THAT IS NOT IN THE BRIEFS
3 BUT I PROVIDED TO THE DEFENDANTS BEFORE THIS ARGUMENT.

4 **THE COURT:** OKAY.

5 **MR. HARVEY:** HERE IS THE HANDOUT.

6 (DOCUMENT HANDED TO COUNSEL AND COURT.)

7 **MR. HARVEY:** THE CASE THAT I'VE JUST HAD PASSED TO
8 YOUR HONOR IS A 2016 CALIFORNIA COURT OF APPEALS CASE THAT
9 RELIES ON THE GUIDELINES TO RESOLVE ISSUES OF HOW TO APPLY THE
10 ANTITRUST LAWS IN THE INSURANCE CONTEXT.

11 **THE COURT:** OKAY.

12 **MR. HARVEY:** OKAY.

13 I AGREE WITH ONE OF THE COMMENTS MADE BY THE DEFENDANTS TO
14 YOUR HONOR TODAY THAT ALL OF THE IMMUNITY ARGUMENTS, IF YOU
15 WILL, REST ON ONE COMMON ISSUE. AND THAT IS, DOES THIS
16 REGULATOR, DOES THE CALIFORNIA DEPARTMENT OF INSURANCE HAVE
17 AUTHORITY TO REGULATE THE COMPETITIVENESS OF RATES OR THE
18 COMPETITIVENESS OF REBATES OR DISCOUNTS OFF OF THOSE RATES.
19 AND THE ANSWER IS UNEQUIVOCALLY NO.

20 THE CALIFORNIA ATTORNEY GENERAL GUIDELINES GO INTO THIS IN
21 GREAT DEPTH, AND ASIDE FROM THAT, THE LANGUAGE OF THE
22 PROPOSITION ITSELF MAKES IT VERY CLEAR THAT THE ANTITRUST LAWS
23 DO APPLY IN THIS CONTEXT.

24 NOW I THINK IT MAY BE USEFUL TO NOTE THAT PRIOR TO PROP
25 103, CDI DID HAVE AUTHORITY OVER COMPETITION. CALIFORNIA

1 VIEWED THAT TO BE INSUFFICIENT BECAUSE IT RESULTED IN PRICES
2 THAT WERE EXCESSIVE AND NONCOMPETITIVE.

3 SO THE STATED -- LET ME QUOTE THE CONCERNS FROM THE
4 LANGUAGE OF PROP 103 ITSELF, WHICH IS AN APPENDIX TO THE
5 CALIFORNIA GUIDELINES THAT I PROVIDED TO THE COURT.

6 QUOTE, "THE PURPOSE OF PROP 103 IS TO PROTECT CONSUMERS
7 AND ALLOW INSURANCE COMPANIES" -- I'M SORRY.

8 PROP 103 DECLARED THAT THE THEN EXISTING SYSTEM PRIOR TO
9 PROP 103 FAILED TO, QUOTE, "PROTECT CONSUMERS AND ALLOWED
10 INSURANCE COMPANIES TO CHARGE EXCESSIVE, UNJUSTIFIED, AND
11 ARBITRARY RATES," UNQUOTE.

12 THE PURPOSE OF PROP 103 IS TO QUOTE "PROTECT CONSUMERS,
13 ENCOURAGE A COMPETITIVE MARKETPLACE, AND ENSURE THAT INSURANCE
14 IS AFFORDABLE FOR ALL CALIFORNIANS." TO DO THAT IT CREATED A
15 NEW SECTION 1861.03(A) OF THE INSURANCE CODE THAT STATES
16 QUOTE, "THE BUSINESS OF INSURANCE SHALL BE SUBJECT TO THE LAWS
17 OF CALIFORNIA APPLICABLE TO ANY OTHER BUSINESS INCLUDING THE
18 ANTITRUST LAWS."

19 THE CALIFORNIA ATTORNEY GENERAL GUIDELINES -- THE
20 DEFENDANTS MOCK THEM IN THEIR RESPONSE AS BEING OLD, BUT THEY
21 WERE CREATED AND DISSEMINATED SHORTLY AFTER PROP 103. SO IN
22 THAT SENSE I THINK THEY ARE VERY VALUABLE BECAUSE THEY ARE
23 MUCH CLOSER TO PROP 103 THAN WE ARE.

24 AND THEY UNDERSTOOD EXACTLY WHAT THEY WERE DOING; THAT
25 PROP 103 WORKED A SEA CHANGE AND THEY WANTED TO CREATE A GUIDE

1 FOR COURTS AND THE INDUSTRY ON HOW THIS REGULATORY STRUCTURE
2 IS GOING TO WORK GOING FORWARD.

3 THOSE GUIDELINES EXPLAIN THAT -- THAT NEW SPECIFIC
4 PROVISION PREVAILS OVER ANY INTERPRETATION OF THE PRIOR
5 SECTION 1860.1 ON WHICH DEFENDANTS RELY, QUOTE, "THE CONTINUED
6 EXISTENCE OF WHICH IS NO IMPEDIMENT TO THE APPLICATION OF THE
7 CARTWRIGHT ACT." THAT'S IN THE GUIDELINES AT PAGE 23,
8 FOOTNOTE 107.

9 IMPORTANTLY, PROP 103 ALSO DIVESTED CDI OF ANY AUTHORITY
10 WHATSOEVER OVER COMPETITION ISSUES. IT DID SO IN THE NEW
11 SECTION 1861.05 WHICH STATES, QUOTE, "NO CONSIDERATION SHALL
12 BE GIVEN TO THE DEGREE OF COMPETITION."

13 AND THE GUIDELINES EXPLAIN THE SIGNIFICANCE OF THIS
14 ADDITION AT PAGE 26. QUOTE, "THIS TAKES AWAY FROM THE
15 COMMISSIONER THE AUTHORITY TO FIND THAT THERE'S ADEQUATE
16 COMPETITION IN REVIEWING RATES, BUT IT DOES NOT RELIEVE THE
17 MARKET ITSELF OF THE REQUIREMENTS OF RATE COMPETITION UNDER
18 THE ANTITRUST LAWS."

19 IT STATES THE CONSEQUENCE OF THIS VERY CLEARLY AT PAGE 29.
20 PROP 103 ILLUMINATES THE PROHIBITION OF REBATING THROUGH THE
21 REPEAL OF INSURANCE CODE 750 AND THEREAFTER. REBATING OF
22 COMMISSIONS IS NOW SUBJECT TO THE ANTITRUST LAWS.

23 AND FURTHER ON PAGE 18, QUOTE, "THE FACT THAT RATES ARE
24 APPROVED BY THE STATE DOES NOT IMMUNIZE INSURANCE COMPANIES
25 FROM PRICE-FIXING CHARGES."

1 AND THE NINTH CIRCUIT IN A CASE THAT IS IN THE BRIEFS --

2 **THE COURT:** YOU CITE THESE GUIDELINES ON PAGE 28, I
3 WANT TO SAY, OF YOUR BRIEF?

4 **MR. HARVEY:** THAT'S RIGHT.

5 **THE COURT:** IN RESPONSE -- THAT IS ACTUALLY NOT
6 CORRECT. PAGE 26 OF YOUR BRIEF IN SUPPORT OF THE POINT THAT
7 THE FILED RATE DOCTRINE DOES NOT APPLY TO PLAINTIFFS'
8 CALIFORNIA CARTWRIGHT ACT CLAIM, RIGHT?

9 **MR. HARVEY:** CORRECT.

10 **THE COURT:** DO YOU CITE THOSE GUIDELINES ANYWHERE
11 ELSE IN YOUR BRIEF?

12 **MR. HARVEY:** WE DO NOT.

13 **THE COURT:** OKAY.

14 **MR. HARVEY:** IF YOUR HONOR BELIEVES IT WOULD BE FAIR
15 TO GIVE THE DEFENDANTS A SUPPLEMENTAL BRIEF TO RESPOND, I
16 WOULD HAVE NO OBJECTION.

17 **THE COURT:** IT'S REALLY THE COURT'S PREPARATION FOR
18 THE HEARING THAT I'M GETTING AT, NOT SO MUCH THE FAIRNESS TO
19 THE DEFENDANTS. IT'S JUST I'M NOT DOING MY BEST WORK
20 PROCESSING THIS FOR THE FIRST TIME. AND IT SEEMS TO BE
21 COMPOSING THE MAJORITY OF YOUR ARGUMENT THIS AFTERNOON.

22 I DON'T HAVE ANYTHING MORE TO SAY ABOUT THAT AND I'M NOT
23 GOING TO STOP YOU, I JUST WANTED TO MAKE THAT POINT.

24 **MR. HARVEY:** I DO APOLOGIZE FOR THAT, YOUR HONOR. I
25 THINK IN PREPARING FOR THIS ARGUMENT AND IN RE-READING THE

1 DOCUMENT THAT WE PREVIOUSLY FILED WITH THE COURT, WE
2 APPRECIATED, I THINK, MORE THAN WE DID AT THE TIME OF WRITING
3 THE BRIEF HOW IMPORTANT AND HOW RELEVANT THAT DOCUMENT IS TO
4 MORE THAN JUST THE PURPOSE FOR WHICH WE CITED IT IN OUR
5 OPPOSITION BRIEF.

6 **THE COURT:** OKAY.

7 **MR. HARVEY:** I WAS JUST ABOUT TO REFER TO A 2010
8 NINTH CIRCUIT CASE THAT REVERSED A RETIRED JUDGE WARE'S
9 DECISION DISMISSING A CASE SIMILAR TO THIS BECAUSE HE
10 CONCLUDED ERRONEOUSLY THAT THE COURT LACKED JURISDICTION OVER
11 THE ANTITRUST COMPLAINT BECAUSE IT WAS... BECAUSE THE
12 COMMISSIONER HAD EXCLUSIVE RATE-MAKING AUTHORITY.

13 I WILL QUOTE FROM THE *PEREZ* CASE. QUOTE -- THIS IS THE
14 NINTH CIRCUIT IN REVERSING JUDGE WARE, QUOTE, "WE HOLD THAT
15 ANTITRUST CLAIMS THAT PRODUCE OVERCHARGES DO NOT FALL UNDER
16 THE INSURANCE COMMISSIONER'S EXCLUSIVE RATE-MAKING AUTHORITY."

17 AND FURTHER QUOTE, "BECAUSE COURTS HAVE THE PRIMARY, IF
18 NOT EXCLUSIVE JURISDICTION OVER ANTITRUST CAUSES OF ACTION,
19 THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS ON
20 THE GROUNDS THAT THEY IMPERMISSIBLY CHALLENGE STATE APPROVED
21 INSURANCE RATES."

22 NOW I WOULD LIKE TO MOVE SPECIFICALLY TO
23 MCCARRAN-FERGUSON. I WOULD LIKE TO TRY TO CONVINCE YOUR HONOR
24 TO CHANGE THE COURT'S VIEW IN THE TENTATIVE WITH RESPECT TO
25 THE SHERMAN ACT. AND, AGAIN, I'LL NOTE THIS DOES NOT APPLY TO

1 THE CARTWRIGHT ACT, IT ONLY APPLIES TO THE SHERMAN ACT AS THE
2 DEFENDANTS STATED.

3 THE MCCARRAN-FERGUSON CONCERNS ONLY APPLY TO THE EXTENT
4 THAT THERE'S A STATE REGULATOR THAT IN SOME WAY IS MEANT TO
5 DISPLACE THE ANTITRUST LAWS. IT'S A DOCTRINE OF COMITY AND
6 DEFERENCE TO A STATE REGULATORY SYSTEM THAT WHERE THE STATE
7 BASICALLY SAYS, FOR THIS REGULATED INDUSTRY, WE'RE GOING TO
8 TAKE THE ANTITRUST LAWS OUT AND WE ARE GOING TO REPLACE IT
9 WITH SOME REGULATORY SYSTEM.

10 PROP 103 DOES THE OPPOSITE OF THAT. THE ABSOLUTE
11 OPPOSITE. IT DIVESTS THE REGULATOR OF ANY AUTHORITY OVER
12 COMPETITION, AND INCLUDES A STATUTORY PROHIBITION ON THE
13 REGULATOR EVEN CONSIDERING COMPETITION ISSUES. AND IT
14 EXPRESSLY SAYS, CONTRARY TO WHAT THE DEFENDANTS ARGUE, THAT
15 DOESN'T MEAN THAT COMPETITION IS NOT IMPORTANT TO CALIFORNIA.
16 IT SAID WE ACHIEVE THE GOALS OF COMPETITION THROUGH THE
17 APPLICATION OF THE ANTITRUST LAWS.

18 SO THE MCCARRAN-FERGUSON IMMUNITY HAS NO PLACE IN THIS
19 CASE. IT FAILS FOR A COMPLETELY SEPARATE REASON; THAT THE
20 CHALLENGED CONDUCT HERE IS NOT THE BUSINESS OF INSURANCE.

21 NOW, IT IS CERTAINLY TRUE THAT SUBMITTING A RATE TO THE
22 CDI IS PART OF THE LEGITIMATE BUSINESS OF INSURANCE, BUT
23 THAT'S NOT THE QUESTION. THE QUESTION IS, IS THE CHALLENGED
24 CONDUCT, THE PRICE-FIXING CONSPIRACY, THE LEGITIMATE BUSINESS
25 OF INSURANCE.

1 SURETIES DECIDING AMONG THEMSELVES TO ALL SUBMIT THE SAME
2 RATES AND THEN ONE BY ONE SUBMITTING RATES IN COMPLIANCE WITH
3 THAT CONSPIRACY IS NOT THE LEGITIMATE BUSINESS OF INSURANCE.

4 NOW, SUPPOSE HYPOTHETICALLY THAT INSTEAD OF THAT THE
5 SURETIES DECIDED TO CREATE ONE JOINT VENTURE THAT WOULD SPREAD
6 RISK ACROSS ALL THE SURETIES, AND THEN GO TO THE CDI AND SAY,
7 LOOK, WE HAVE THIS IDEA. WE WANT TO SPREAD RISK IN A
8 DIFFERENT WAY, AND WE'RE GOING TO SUBMIT THAT TO YOU FOR
9 APPROVAL. NOTHING LIKE THAT IS AT ISSUE IN THIS CASE.

10 AND THE *BUCKMAN* CASE, WHICH DEFENSE COUNSEL POINTED TO THE
11 COURT AS THE BEST CASE FOR THIS PROPOSITION, ONLY ILLUSTRATES
12 THE POINT. AT ISSUE IN *BUCKMAN* WAS WHETHER THE
13 RELATIONSHIP -- I THINK THE ISSUING OF THE BAIL BOND FROM THE
14 AGENT TO A CUSTOMER, WHETHER THAT WAS THE BUSINESS OF
15 INSURANCE.

16 OF COURSE IT IS. AND WE DON'T DISAGREE WITH THAT. WE
17 DON'T DEPEND ON IT. YES, BAIL BOND IS REGULATED BY THE
18 INSURANCE CODE --

19 **THE COURT:** LET'S GO UP A LEVEL. YOUR DISTINGUISHING
20 OF *BUCKMAN* IS IN YOUR BRIEF.

21 TODAY ARE YOU ARGUING THAT IF THERE'S AN AGREEMENT BETWEEN
22 SURETIES ON WHAT RATE THEY ARE ALL GOING TO SUBMIT TO THE
23 DEPARTMENT OF INSURANCE THAT SOMEHOW THAT TAKES WHAT THEY ARE
24 DOING OUT OF MCCARRAN-FERGUSON?

25 **MR. HARVEY:** YES.

1 **THE COURT:** OKAY.

2 **MR. HARVEY:** BECAUSE THERE WAS NO REGULATOR WITH
3 AUTHORITY TO ASSESS THAT CONDUCT. THAT CONDUCT IS, IS INSTEAD
4 UNDER THE SCRUTINY OF THE ANTITRUST LAWS. AND WHILE THERE ARE
5 FEDERAL DOCTRINES LIKE MCCARRAN-FERGUSON THAT SAY THAT IF
6 THERE'S A TENSION BETWEEN FEDERAL ANTITRUST LAW AND THE STATE
7 REGULATORY STRUCTURE, SOMETIMES YOU DEFER TO THE STATE
8 REGULATORY STRUCTURE. THERE IS NO SUCH DEFERENCE WITH RESPECT
9 TO FEDERAL ANTITRUST LAW AND STATE ANTITRUST LAW. THEY BOTH
10 APPLY AT THE SAME TIME.

11 **THE COURT:** WHAT ARE THE FACTS OF *GROUP LIFE AND*
12 *HEALTH INSURANCE COMPANY*? WHAT YOU SAID ON PAGE 20. ALL THIS
13 BUSINESS ABOUT THE STATE ATTORNEY GENERAL GUIDELINES AND ALL
14 THAT ARE NOT CITED ON THIS POINT, AND THE POINT THAT YOU ARE
15 MAKING NOW AT THE HEARING ALSO I THINK IS NOT CONTAINED AT
16 PAGE 20 TO 21 OF YOUR BRIEF.

17 BUT YOU DO CITE A CASE CALLED *GROUP LIFE AND HEALTH*
18 *INSURANCE COMPANY VERSUS ROYAL DRUG* TO ARGUE THAT
19 MCCARRAN-FERGUSON DOESN'T APPLY HERE.

20 WHAT ARE THE FACTS OF THAT CASE?

21 **MR. HARVEY:** I DO NOT HAVE THAT AT MY -- ACCESSIBLE
22 AT THE MOMENT.

23 **THE COURT:** ALL RIGHT.

24 **MR. HARVEY:** PERHAPS ONE OF MY COLLEAGUES WILL
25 SUPPLEMENT IT AFTER THIS ARGUMENT.

1 THE UNDERLYING ARGUMENT THAT I'M MAKING HERE I BELIEVE IS
2 IN THE BRIEF, WHICH IS MCCARRAN-FERGUSON DOES NOT APPLY FOR
3 TWO REASONS. ONE, THE CHALLENGED CONDUCT IS NOT THE BUSINESS
4 OF INSURANCE. AND THE CASE THAT WE CITE FOR THIS PROPOSITION
5 IS *PERRY VERSUS FIDELITY* FIFTH CIRCUIT 1979. CITE IS 606 F.2D
6 468, 470.

7 AND WITH THAT CASE -- THE PROPOSITION THAT CASE STANDS FOR
8 IS THAT THE QUESTION IS NOT IS THE BAIL BOND INDUSTRY THE
9 BUSINESS OF INSURANCE. IT'S YOU LOOK ONLY AT THE ALLEGED
10 MISCONDUCT, AND ASK IF THAT CONDUCT SERVES TO SPREAD RISK IN A
11 WAY THAT LOOKS LIKE INSURANCE. AND THE ALLEGED CONSPIRACY
12 HERE IS NOT THAT.

13 THERE ARE OTHER ISSUES HERE THAT I DON'T BELIEVE WE ARE IN
14 DISAGREEMENT WITH YOUR HONOR IN TERMS OF THE TENTATIVE WHEN IT
15 COMES TO STATE ACTION, FILED RATE DOCTRINE, OR WHAT THE
16 DEFENDANTS CLAIM IS THE EXCLUSIVE JURISDICTION OF CDI OR
17 NOERR-PENNINGTON.

18 SO UNLESS THE COURT HAS ANY QUESTIONS ABOUT ANY OF THOSE
19 DEFENSES, I WOULD BE INCLINED TO MOVE ON TO THE 12(B)(6)
20 ISSUES.

21 **THE COURT:** ALL RIGHT.

22 **MR. HARVEY:** THANK YOU.

23 THE COURT ABSOLUTELY GOT IT RIGHT IN TERMS OF WHAT THE
24 ALLEGED CONSPIRACY IS. IT HAS TWO PARTS. ONE IS TO AGREE ON
25 THE RATES TO SUBMIT TO CDI, THE 10 PERCENT/8 PERCENT AND, TWO,

1 TO ELIMINATE DISCOUNTING AS MUCH AS POSSIBLE OFF OF THOSE
2 RATES PRIMARILY BY PROHIBITING ADVERTISED DISCOUNTS.

3 AND I CERTAINLY APPRECIATE THAT THE COMPLAINT COULD BE
4 CLEARER ON THIS. AND IF THE COURT GIVES PLAINTIFFS AN
5 OPPORTUNITY TO AMEND, WE WILL MAKE THAT CRYSTAL CLEAR.

6 WHILE I'M HERE, I CAN'T HELP BUT TRY TO CONVINCE THE COURT
7 THAT IT IS ALREADY GOOD ENOUGH. AND TO THAT POINT, I WOULD
8 DIRECT THE COURT TO THE COMPLAINT STARTING AT PARAGRAPH 65,
9 PAGE 13, THE LAST SENTENCE. QUOTE, "THE MARKET FAILURE HERE
10 IS DEFENDANTS' CONSPIRACY TO KEEP DEFAULT PREMIUM RATES FIXED
11 AT 10 PERCENT, ADVERTISE THEM AS LEGAL MINIMUMS, AND PREVENT
12 DISCOUNTING OR REBATING AS MUCH AS POSSIBLE."

13 THAT CONSPIRACY IS ALSO DESCRIBED IN -- AND I WILL LIST
14 THE PARAGRAPHS FOR THE RECORD. I DON'T THINK IT'S USEFUL FOR
15 ME TO READ THROUGH THEM ALL NOW. PARAGRAPHS 68, 69, 70, 71,
16 73, 78, 83, 84, 88, 90, 93 THROUGH 99, AND 105.

17 I THINK PERHAPS THE AMBIGUITY THE COURT WAS WORRIED ABOUT
18 IS WHEN THE COMPLAINT REFERS TO PREMIUM DISCOUNTING, INSTEAD
19 OF BEING CLEAR ABOUT REBATING THE COMMISSION -- IS THAT THE
20 WORRY? AND THE --

21 **THE COURT:** THIS IS AN ARGUMENT YOUR OPPONENT MAKES.

22 I THINK I -- I UNDERSTAND THE DIFFERENCE.

23 **MR. HARVEY:** OKAY. I WOULD JUST URGE THE COURT TO
24 FIND THAT THE COMPLAINT AS ALLEGED SUFFICIENTLY ALLEGES A
25 CONSPIRACY TO ELIMINATE ADVERTISED DISCOUNTING OFF OF THE

1 APPROVED RATES.

2 NOW LET ME TAKE A STEP BACK IN THE SORT OF WHAT IS THE
3 CONSPIRACY AND WHY IS IT PLAUSIBLE TO INFER THAT THESE
4 DEFENDANTS COLLUDED TO INFLATE THE PRICE OF BAIL BONDS IN
5 CALIFORNIA.

6 AS CARMICHAEL STATES IN HIS 2005 STATEMENT THAT WE
7 HIGHLIGHT IN OUR BRIEF, "THE WAY THE MARKET WORKS IS THAT IF
8 COMPETITIVE FORCES ARE ALLOWED TO OPERATE, THERE'S NO WAY THAT
9 THE SUPERCOMPETITIVE PROFIT MARGINS THAT THEY ARE ENJOYING
10 WILL BE ABLE TO CONTINUE. UNILATERAL ACTION," IN
11 MR. CARMICHAEL'S WORDS, "THROUGH SIMPLE ECONOMICS WILL RESULT
12 IN DISCOUNTING OFF OF THOSE RATES, PRICES WILL COME DOWN, AND
13 THE SPLIT BETWEEN THE AGENT AND THE SURETY ABOUT WHO GETS WHAT
14 FROM THE PREMIUM IS GOING TO HAVE TO CHANGE, WITH THE END
15 RESULT BEING THAT SURETIES AND AGENTS MAKE LESS MONEY AND
16 PRICES TO CONSUMERS IS LOWER."

17 **THE COURT:** IS AN ALLEGATION OF SUSTAINED ABOVE
18 MARKET RETURN ON INVESTMENT BY ITSELF ENOUGH TO ALLEGE AN
19 ANTITRUST CONSPIRACY?

20 **MR. HARVEY:** NO. NO, I THINK YOU NEED MORE. AND
21 THERE'S SUBSTANTIALLY MORE IN THIS CASE.

22 BECAUSE HERE, WHAT CARMICHAEL IS SAYING, IN ALL THE
23 *TWOMBLY* CASES THAT THE PARTIES CITE, I DID NOT SEE ANY
24 ADMISSION, ANY STATEMENT FROM ONE OF THE DEFENDANTS THEMSELF
25 THAT'S ANYTHING LIKE THIS, WHERE HE SAYS, THIS IS HOW THE

1 MARKET WORKS. IF WE DON'T COLLUDE -- I THINK CERTAINLY A FAIR
2 INFERENCE FOR THE PLAINTIFFS ON THIS IS THAT WHAT HE'S SAYING
3 IN THAT EXHIBIT, THAT IF WE DON'T COORDINATE OUR ACTIVITY, OUR
4 UNILATERAL INCENTIVES BY OPERATION OF SIMPLE ECONOMICS WILL
5 BRING PRICES DOWN, AND HE REFERS TO DISCOUNTING BOTH LEGAL AND
6 ILLEGAL.

7 HE'S SAYING THIS ON THE WEBSITE OF THE SURETY COMPANY.
8 NOT ON HIS PRIVATE BLOG, ON THE OFFICIAL WEBSITE OF THE
9 SURETY. AND HE'S SAYING THIS TO A SURETY THAT OPERATES IN
10 MORE THAN ONE STATE, CALIFORNIA. THINK ABOUT CALIFORNIA. IF
11 YOU WOULD EXPECT TO SEE WHAT CARMICHAEL PREDICTED OCCUR
12 ANYWHERE IN THE COUNTRY, IT WOULD BE CALIFORNIA BECAUSE OF
13 PROP 103.

14 ACCORDING TO CARMICHAEL'S OWN DESCRIPTION OF THE MARKET,
15 IT CAN ONLY LOOK LIKE HOW IT LOOKS THROUGH COORDINATED ACTION.

16 **THE COURT:** DO YOU -- THAT REMINDS ME. DO YOU WANT
17 TO RESPOND TO YOUR OPPONENT'S ARGUMENTS ABOUT FRAUDULENT
18 CONCEALMENT?

19 **MR. HARVEY:** MY COLLEAGUE, MS. LUBIN, IS GOING TO
20 ADDRESS FRAUDULENT CONCEALMENT, WHICH WE CAN DO NOW IF YOU
21 LIKE.

22 **THE COURT:** WELL, IT'S 3:05 P.M. I THINK IF
23 MS. LUBIN WANTS TO ADDRESS THE COURT, WE PROBABLY OUGHT TO LET
24 HER.

25 **MR. HARVEY:** ABSOLUTELY.

1 **THE COURT:** GOOD. MS. LUBIN.

2 **MS. LUBIN:** THANK YOU, YOUR HONOR. KATHERINE LUBIN
3 FOR THE PLAINTIFFS.

4 COUPLE OF THINGS I WAS GOING TO ADDRESS. WE'LL START WITH
5 THE STATUTE OF LIMITATIONS AND FRAUDULENT CONCEALMENT BRIEFLY,
6 AS WELL AS THE MOTION TO DISMISS WITH RESPECT TO THE CERTAIN
7 18 INDIVIDUAL DEFENDANTS AND EACH OF THOSE CATEGORIES. I
8 HEARD YOUR HONOR'S TENTATIVE WITH RESPECT TO THOSE, SO I'M
9 HAPPY TO TALK THROUGH THOSE AS WELL.

10 **THE COURT:** OKAY.

11 **MS. LUBIN:** SO BEGINNING WITH THE STATUTE OF
12 LIMITATIONS ARGUMENT AND FRAUDULENT CONCEALMENT, I HEARD WHEN
13 YOU WERE SPEAKING WITH MR. CIESLAK, YOU SAY THAT PERHAPS
14 THE -- OR I UNDERSTOOD THE COURT'S TENTATIVE TO BE THAT EITHER
15 PLAINTIFFS HAD ADEQUATELY ALLEGED FRAUDULENT CONCEALMENT OR IN
16 THE EVENT WE WERE GIVEN THE OPPORTUNITY TO AMEND, THERE MAY BE
17 SOME FURTHER GUIDANCE ON THAT.

18 I'M HERE TO EXPLAIN WHY WE HAVE ADEQUATELY ALLEGED IT AT
19 THIS STAGE. AS YOU NOTED, IT'S A HIGHLY FACT INTENSIVE
20 INQUIRY, IN PARTICULAR THE SECOND PRONG, WHICH IS CONSTRUCTIVE
21 NOTICE.

22 THE FIRST PRONG IS AFFIRMATIVE ACTS OF MISREPRESENTATION.
23 ONE OF THE THINGS THAT WE HAVE SEEN FROM --

24 **THE COURT:** I THINK I KNOW WHAT THE STANDARD IS.
25 WHAT WOULD BE HELPFUL TO ME IS YOUR SHOWING ME -- IS YOUR

1 RESPONDING DIRECTLY TO YOUR OPPONENT'S CHALLENGE TO SHOW ME
2 THE PARAGRAPHS IN THE COMPLAINT THAT MAKE THESE FRAUDULENT
3 CONCEALMENT ALLEGATIONS.

4 **MS. LUBIN:** ABSOLUTELY.

5 SO WITH RESPECT TO THE AFFIRMATIVE ACTS TO MISLEAD, THE
6 KEY POINT THERE IS THAT THE STATEMENTS MUST BE MISLEADING BUT
7 NOT NECESSARILY FALSE. THERE'S A DISTINCTION THERE.

8 SO I HEARD DEFENDANTS SAY THAT CERTAIN OF THE STATEMENTS
9 ABOUT WHETHER THE BAIL AGENTS WERE AUTHORIZED, AS YOUR HONOR
10 NOTED, NEEDED TO BE FALSE IN ORDER TO BE AFFIRMATIVE ACTS OF
11 CONCEALMENT. WHAT THEY NEED TO BE IS MISLEADING, AND ONCE
12 THEY ARE MAKING AFFIRMATIVE STATEMENTS ABOUT WHAT THE
13 PARTICULAR PREMIUM RATES ARE AND THAT THEY ARE AUTHORIZED TO
14 OFFER THOSE RATES.

15 BY WAY OF EXAMPLE, THAT IS THE STATEMENT IN PARAGRAPH 73
16 BY ALADDIN ON THEIR WEBSITE AND THAT NO ONE ELSE HAS PRICES
17 LOWER THAN ALADDIN.

18 THERE'S A NUMBER OF OTHER PLACES WHERE CERTAIN OTHER BAIL
19 AGENTS MAKE SIMILAR STATEMENTS. PARAGRAPHS 83, 95, 97, 98,
20 99, 100. AND THEN SOME OTHER STATEMENTS BETWEEN 89 AND 90 AS
21 WELL.

22 WHAT THESE STATEMENTS SAY IS THAT THE RATE THAT ARE
23 OFFERED ARE EITHER THE 10 PERCENT OR THE PREFERRED RATE OF
24 8 PERCENT. WHAT THEY DON'T SAY IS THAT IN SOME INSTANCES
25 THERE'S A SUGGESTION THAT DISCOUNTING OR REBATES, AS WE

1 OCCASIONALLY REFER TO IT IN THE COMPLAINT, IS ILLEGAL. BUT IN
2 MANY INSTANCES THEY DON'T SAY ANYTHING ABOUT DISCOUNTING.

3 AND WHAT DEFENDANTS HAVE ARGUED IS, WELL, YOU SHOULD LOOK
4 TO THE CDI WEBSITE WHICH DOES SAY PURSUANT TO PROP 103, THAT
5 DISCOUNTING IS LEGAL AND ALLOWABLE OFF OF THE FILED RATES.

6 THAT'S WHERE IT'S MISLEADING. ONCE THESE BAIL AGENTS
7 BEGIN MAKING REPRESENTATIONS ABOUT THE RATES THAT WERE
8 OFFERED, THAT THEY ARE AUTHORIZED TO OFFER, YET NOT GIVING THE
9 ADDITIONAL INFORMATION WITH RESPECT TO DISCOUNTS BEING
10 AVAILABLE IN CERTAIN CIRCUMSTANCES, OR THE FACT THAT
11 NEGOTIATION CAN OCCUR, THE STATEMENT BECOME MISLEADING. IT IS
12 AN AFFIRMATIVE ACT.

13 ONE THING DEFENDANTS NOTED IN THEIR BRIEFING IS THAT THE
14 AFFIRMATIVE ACTS OF MISLEADING THE CONSUMER NEED TO BE, THEY
15 USE THE TERMINOLOGY "ABOVE AND BEYOND", WHICH IS SOME LANGUAGE
16 FROM THE NINTH CIRCUIT IN *GUERRERO*. WHAT THAT MEANS IS NOT
17 SEPARATE AND APART. AND JUDGE KOH, IN FACT, DESCRIBES THIS IN
18 A SUBSEQUENT *ANIMATION* ORDER. YOUR HONOR CITED IT IN YOUR *CRT*
19 SUMMARY JUDGMENT DECISION FROM 2016.

20 SO, TO THE EXTENT THAT CERTAIN OF THESE AFFIRMATIVE ACTS
21 TO MISLEAD ARE THEMSELVES EVIDENCE OF A CONSPIRACY THAT WE
22 HAVE PUT FORTH, EVIDENCE OF A PLAUSIBLE CONSPIRACY, THAT'S
23 ACCEPTABLE UNDER THE FRAUDULENT CONCEALMENT DOCTRINE.

24 THE SECOND ELEMENT IS EITHER ACTUAL OR CONSTRUCTIVE
25 NOTICE. AND YOUR HONOR NOTED THAT CONSTRUCTIVE NOTICE IS

1 PARTICULARLY A FACT INTENSIVE INQUIRY. AND YOU'RE RIGHT, THAT
2 THE CONTEXT OF HOW YOU DETERMINE WHETHER A PLAINTIFF, A
3 PARTICULAR PLAINTIFF IS ON CONSTRUCTIVE NOTICE, THE CONTEXT
4 MATTERS IN THIS INSTANCE.

5 AND WHAT WE SEE IS THE MAJORITY OF THE CLASS KIND OF FALL
6 INTO ONE OR TWO GROUPS. THE FIRST IS THEY ARE ACTUALLY
7 INCARCERATED AT THE TIME. SO THEY HAVE ACCESS TO PERHAPS A
8 PHONE BOOK OR A FLIER FOR A BAIL BOND AGENCY, OR THEY ARE
9 OTHERWISE A FAMILY MEMBER WALKING INTO ONE OF THE SHOPS
10 OUTSIDE OF 850 BRYANT, FOR EXAMPLE, IN SAN FRANCISCO, AND
11 URGENTLY WANTING TO OBTAIN A BOND SO THAT A LOVED ONE OR
12 FAMILY MEMBER OR FRIEND CAN GET OUT OF JAIL.

13 SO GIVEN THAT CONTEXT, GIVEN THE STATEMENTS THAT THEY SEE
14 FROM THE BAIL AGENTS ABOUT WHAT THE RATES ARE, WHAT RATES THEY
15 ARE AUTHORIZED TO OFFER, AND THE FACT THAT NO ONE ELSE HAS
16 LOWER PRICES, THE CONTEXT, WHAT THAT TELLS THESE DEFENDANTS
17 IS, YOU KNOW, THAT THEY UNDERSTAND THAT DISCOUNTS ARE NOT
18 AVAILABLE.

19 FURTHER TO THAT POINT, A NUMBER OF THE PUBLICLY-AVAILABLE
20 STATEMENTS, INCLUDING THE 2002 QUOTE THAT BEGINS OUR
21 OPPOSITION BRIEFING, THOSE DON'T PUT DEFENDANTS ON
22 CONSTRUCTIVE NOTICE.

23 YOUR HONOR'S CRT DECISION, I THINK IT'S FOOTNOTE 4 OF THAT
24 DECISION, SETS FORTH A NUMBER OF RED FLAGS THAT COULD, IN
25 FACT, PUT A PLAINTIFF ON NOTICE. IT'S THINGS LIKE AN FTC

1 INVESTIGATION, AN FTC LAWSUIT, REPORTS IN THE *L.A. TIMES* ABOUT
2 PARTICULAR CONDUCT, SENATE TESTIMONY, CONGRESSIONAL
3 INVESTIGATIONS, SO ON AND SO FORTH.

4 THE STATEMENTS ON EITHER INDUSTRY WEBSITES OR BLOGS ARE
5 SIMPLY NOT GOING TO PUT YOUR AVERAGE REASONABLE CONSUMER WHO
6 IS PURCHASING A BAIL BOND ON CONSTRUCTIVE NOTICE.

7 SO THOSE ALLEGATIONS ARE SET FORTH IN THE COMPLAINT. WE
8 ARE HAPPY TO SUPPLEMENT THEM IN THE EVENT NECESSARY IF GIVEN
9 LEAVE TO AMEND.

10 THE -- IF YOUR HONOR HAS NO FURTHER QUESTIONS ON THE
11 STATUTE OF LIMITATIONS PIECE.

12 **THE COURT:** I DON'T.

13 **MS. LUBIN:** OKAY. I WOULD LIKE TO BRIEFLY ADDRESS
14 THE INDIVIDUAL DEFENDANTS 12(B)(6) ARGUMENT, IF I MAY.

15 **THE COURT:** OKAY.

16 **MS. LUBIN:** I HEARD YOUR HONOR FIRST SAY YOU WERE ON
17 THE FENCE WITH RESPECT TO THE INDIVIDUAL DEFENDANTS, SO
18 MR. CARMICHAEL AND MR. WATSON.

19 THOSE INDIVIDUALS ARE HIGH LEVEL EXECUTIVES. THEY SERVE
20 NOT ONLY IN THE BUSINESS CAPACITY LEADING CERTAIN OF THE
21 SURETY DEFENDANTS, BUT ALSO AS CHAIRMAN AND IN ONE INSTANCE
22 BOARD MEMBER OF THE INDUSTRY ORGANIZATIONS. SO WHEN THEY ARE
23 MAKING THESE STATEMENTS ABOUT THE PURPOSE OF THE CONSPIRACY,
24 THE GOAL OF THE CONSPIRACY, HOW WE GO ABOUT ENFORCING IT, HOW
25 WE -- INSTRUCTING THE AGENCIES AND THE AGENTS TO BE THE EYES

1 AND EARS OF THE SURETIES IN ORDER TO ENSURE COMPLIANCE WITH
2 THE CONSPIRACY, THESE ARE ALL ALLEGATIONS THAT APPEAR IN THE
3 COMPLAINT, SPECIFIC WITH RESPECT TO MR. CARMICHAEL AND
4 MR. WATSON.

5 WHAT I HEARD FROM MS. HEALY WAS, WELL, HERE'S SOME OTHER
6 EXPLANATIONS FOR WHAT THESE PARTICULAR STATEMENTS MIGHT MEAN.
7 AND THAT'S ALL WELL AND GOOD, BUT AS YOUR HONOR NOTED, AT THIS
8 STAGE THE APPROPRIATE INFERENCE IS AND REASONABLE INFERENCES
9 ARE DRAWN IN PLAINTIFFS' FAVOR. AND MR. HARVEY HAS EXPLAINED
10 WHAT WE UNDERSTAND AND WHAT THE REASONABLE INFERENCE IS FROM
11 THOSE STATEMENTS ARE WITH RESPECT TO THE CONSPIRACY.

12 COUPLE OF THE OTHER GROUPS, IF I MAY -- IF YOUR HONOR HAS
13 ANY QUESTIONS, I'M HAPPY TO ANSWER THEM.

14 **THE COURT:** I DON'T.

15 **MS. LUBIN:** OKAY.

16 FINALLY, THERE WERE -- I UNDERSTOOD YOUR HONOR'S TENTATIVE
17 TO BE SPECKING TO THE INDIVIDUAL -- THE DEFENDANTS -- SEPARATE
18 DEFENDANTS' MOTION TO DISMISS. THERE WERE 18 DEFENDANTS THAT
19 MOVED. WITH RESPECT TO THE GROUP OF SURETIES, THERE WERE A
20 NUMBER OF SURETIES THAT MOVED AND SAID, ESSENTIALLY, THERE'S
21 INSUFFICIENT ALLEGATIONS WITH RESPECT TO OUR INDIVIDUAL
22 CONDUCT. THE IDEA BEING OUR NAMES APPEAR AS WHEN WE ARE
23 DESCRIBED AS ONE OF THE DEFENDANTS, BUT THEREAFTER IF YOU
24 CONTROL THAT THROUGH THE COMPLAINT, WE DON'T SHOW UP AGAIN.

25 **THE COURT:** RIGHT.

1 **MS. LUBIN:** AND YOUR HONOR MENTIONED THE CRT'S ORDER,
2 WHICH WE CITE, IN FACT, A NUMBER OF THE CRT'S ORDERS FROM YOUR
3 PREDECESSOR ON THAT CASE, JUDGE CONTI, AS WELL AS YOUR
4 HONOR'S; WHAT THOSE EARLIER MOTION TO DISMISS CRT ORDERS SAY,
5 AS WE ARGUE IN OUR BRIEFING, IS THAT IT'S UNNECESSARY AND
6 PARTICULARLY AT THIS STAGE WITHOUT THE BENEFIT OF PARTICULAR
7 DISCOVERY TO SPECIFICALLY ALLEGE EACH AND EVERY DEFENDANT'S
8 STATEMENTS OR PARTICULAR INVOLVEMENT IN THE CONSPIRACY. THAT
9 WOULD BE A PARTICULARITY STANDARD UNDER 9(B).

10 WHAT WE DO HAVE TO SAY IS -- WHAT WE DO HAVE TO DO IS PUT
11 THE SURETY DEFENDANTS ON NOTICE OF WHAT THE CLAIM IS AGAINST
12 THEM. THERE'S A NUMBER OF ALLEGATIONS IN THE COMPLAINT.
13 MR. HARVEY READ THEM OUT.

14 IN PARTICULAR, I WOULD DIRECT YOUR HONOR'S ATTENTION TO
15 PARAGRAPHS 68, 69, AND 71 OF THE COMPLAINT WHICH DESCRIBE THE
16 SURETY DEFENDANTS' INVOLVEMENT IN, A, REGISTERING THE RATES OF
17 10 AND -- OR FILING THE RATES OF 10 AND 8 PERCENT, BUT THEN
18 ALSO DIRECTING THE BAIL AGENTS NOT TO ADVERTISE DISCOUNTS OFF
19 THOSE PARTICULAR RATES.

20 AND THOSE ALLEGATIONS ARE WITH RESPECT TO EACH AND EVERY
21 ONE OF THE SURETY DEFENDANTS, NOTWITHSTANDING THAT THEY ARE
22 NOT EACH LISTED IN THE PARTICULAR COMPLAINT. BUT IF -- TO
23 THAT END, IF THERE'S GUIDANCE YOUR HONOR HAS WITH RESPECT TO
24 THOSE CRT ORDERS OR ADDITIONAL ALLEGATIONS THAT MIGHT BE
25 HELPFUL OR THAT YOU ARE LOOKING FOR, WE'RE HAPPY TO TAKE THAT

1 GUIDANCE BACK.

2 **THE COURT:** OKAY.

3 **MS. LUBIN:** THE FINAL SET OF DEFENDANTS ARE THE TRADE
4 ASSOCIATIONS. SEVERAL PARAGRAPHS OF THE COMPLAINT SPEAK TO,
5 IN PARTICULAR, ONE OF THE TRADE ASSOCIATIONS MAKES AN
6 AFFIRMATIVE STATEMENT ON ITS WEBSITE THAT RATES -- THE RATES
7 TO BE CHARGED ARE THE 10 PERCENT AND 8 PERCENT, AND THEN, OF
8 COURSE, DOES NOT EXPLAIN THAT ADDITIONAL DISCOUNTING IS
9 AVAILABLE.

10 THE OTHER INDUSTRY DEFENDANTS, THERE'S ADDITIONAL
11 ALLEGATIONS WITH RESPECT TO THOSE AS WELL. I'LL DIRECT YOUR
12 HONOR'S ATTENTION, JUST FOR PURPOSES TO MOVE THIS FORWARD, TO
13 PARAGRAPHS 83 AND 87 OF THE COMPLAINT WHICH SPEAK TO THEIR
14 INVOLVEMENT.

15 THE TRADE ASSOCIATIONS OFFER AN OPPORTUNITY FOR THE
16 SURETIES AND THE BAIL AGENTS TO MEET. THEY OFFER AN
17 OPPORTUNITY FOR THE SURETIES TO EDUCATE BAIL AGENTS ABOUT THE
18 CONSPIRACY AND DISCOURAGE THEM FROM ADVERTISING DISCOUNTS OFF
19 THE FILED RATES. THEY OFFER AN OPPORTUNITY TO GATHER
20 INFORMATION, SHARE INFORMATION ABOUT THE RATES THAT ARE
21 ACTUALLY BEING OFFERED, AND TO CONFIRM, IN FACT, THAT
22 DISCOUNTS ARE NOT BEING ADVERTISED OR NOT BEING OFFERED
23 ACROSS -- THE DISCOUNTS ARE NOT BEING ADVERTISED BY THE BAIL
24 AGENTS. SO THEY DO OFFER THOSE OPPORTUNITIES THROUGH
25 MEETINGS, THROUGH BLOG POSTS, THROUGH THEIR OWN WEBSITES TO

1 AFFIRMATIVELY ADVANCE THE CONSPIRACY.

2 IF YOUR HONOR HAS NO FURTHER QUESTIONS, I AM HAPPY TO CEDE
3 THE FLOOR EITHER BACK TO MR. HARVEY OR THE DEFENDANTS.

4 **THE COURT:** I DON'T HAVE ANY MORE QUESTIONS. THANKS.

5 **MS. LUBIN:** THANK YOU.

6 **MR. HARVEY:** YOUR HONOR, IF I MAY JUST A MINUTE?

7 **THE COURT:** LET ME SAY THIS: PERIODICALLY I LEARN
8 ANEW THAT IF I WANT THERE TO BE TIME LIMITS AT A HEARING, I
9 NEED TO SET THEM.

10 YOU HAVE COLLECTIVELY AT YOUR TABLE FIVE MINUTES TO USE
11 HOWEVER YOU LIKE. YOU NEED TO UNDERSTAND THAT IF YOU START
12 USING THEM NOW, YOU ARE PEELING THEM OFF AND THERE WILL BE
13 FEWER MINUTES LEFT AFTER YOUR OPPONENTS HAVE USED THEIR FIVE
14 MINUTES.

15 GO AHEAD.

16 **MR. HARVEY:** UNDERSTOOD, YOUR HONOR. THANK YOU.

17 TO ANSWER YOUR QUESTION ABOUT THE *GROUP LIFE* CASE. THAT
18 IS A SUPREME COURT CASE ADDRESSING WHETHER MEDICAL INSURANCE
19 COMPANIES IN SETTING THE PRICES OF PHARMACEUTICALS IS SUBJECT
20 TO MCCARRAN-FERGUSON AS PART OF THE BUSINESS OF INSURANCE.

21 THE SUPREME COURT HELD THAT IT WAS NOT BECAUSE THE ALLEGED
22 CONDUCT DID NOT SPREAD RISK, WHICH IS EXACTLY WHY WE SAY HERE
23 THAT THE ALLEGED -- BOTH PARTS OF THE ALLEGED CONSPIRACY DO
24 NOT SPREAD RISK.

25 **THE COURT:** THE BUSINESS ITSELF -- I DON'T MEAN TO

1 SPLIT HAIRS, BUT IT'S ACTUALLY THE LINE OF WORK WE ARE BOTH IN
2 IS WE SPLIT HAIRS SOMETIMES.

3 I THINK MY GUESS IS THAT THE COURT WAS ANSWERING IN THAT
4 CASE THE QUESTION, IS THIS THE BUSINESS OF INSURANCE. AND I'M
5 NOT SURE THEY WERE LOOKING JUST AT THE COLLUSIVE CONDUCT.
6 OTHERWISE THERE WOULD BE NO MCCARRAN-FERGUSON ACT IN THE
7 ANTITRUST CONTEXT BECAUSE EVERYONE ALWAYS ALLEGES COLLUSIVE
8 CONDUCT.

9 I WILL READ THE CASE. I'M JUST SAYING I'M NOT SURE IT
10 GOES AS FAR AS YOU ARE SUGGESTING.

11 **MR. HARVEY:** ON THIS EXACT SPLITTING OF HAIRS
12 QUESTION, THE FIFTH CIRCUIT CASE IS CRITICAL. WHAT I WILL SAY
13 IS THAT THERE ARE PLENTY OF EXAMPLES THAT DO FIT.

14 FOR EXAMPLE, IF A RIVAL BAIL AGENT IS CHALLENGING SOME
15 ARRANGEMENT BETWEEN AN AGENT AND A SURETY TO CREATE AN
16 EXCLUSIVE TERRITORY, THAT YOU CAN SELL BAIL BONDS IN THIS
17 TERRITORY, BUT NOT THIS TERRITORY, THINGS LIKE THAT IN THE
18 KINDS OF CASES THAT DEFENDANTS CITE WHERE THE MISCONDUCT
19 ITSELF INVOLVES THE SPREADING OF RISK AMONG DIFFERENT
20 ENTITIES, THAT'S THE BUSINESS OF INSURANCE, NOT A PRICE-FIXING
21 CONSPIRACY.

22 ONE OTHER VERY QUICK COMMENT. I THINK YOUR HONOR SAID
23 THERE'S AMBIGUITY AS TO WHAT THE PARALLEL CONDUCT IS IN THIS
24 CASE. PARALLEL CONDUCT IS SUBMITTING 10/8 PERCENT RATES --

25 **THE COURT:** I KNOW WHAT THE PARALLEL -- I KNOW WHAT

1 YOU THINK THE PARALLEL CONDUCT IS. I'M JUST SAYING YOU DON'T
2 SAY VERY MUCH ABOUT IT IN THE COMPLAINT. THAT'S MY ONLY
3 POINT.

4 **MR. HARVEY:** THANK YOU.

5 **MS. MEJIA:** YOUR HONOR, WE WANT TO USE OUR FIVE
6 MINUTES WISELY. ARE THERE PARTICULAR QUESTIONS THAT YOU WOULD
7 LIKE US TO ADDRESS ISSUES? IF NOT, MR. HAMILL WILL TAKE THE
8 REGULATORY DEFENSES FIRST.

9 **THE COURT:** VERY GOOD. MR. HAMILL.

10 **MR. HAMILL:** YOUR HONOR, ON THE ANTITRUST GUIDELINES,
11 MACKAY AND THE WALKER CASES, WHICH CAME OUT IN 2010, I
12 BELIEVE, AND 2000 RESPECTIVELY, WENT THROUGH THESE ISSUES IN
13 THE SENSE, NOT THE GUIDELINES GOING THROUGH THIS ISSUE, THAT
14 THE KEY QUESTION UNDER THE INSURANCE CODE IS, IS THE LAWSUIT
15 ATTACKING THE RATE-MAKING FUNCTION, RATE MAKING.

16 THAT'S WHY YOUR TENTATIVE IS CORRECT BECAUSE THE CLAIMS
17 HERE INSOFAR AS THEY RELATE TO PREMIUMS GO TO RATE MAKING. IN
18 THAT RESPECT, WHEN IT COMES TO THE CLAIMS REGARDING PREMIUMS,
19 YOUR TENTATIVE IS CORRECT BECAUSE THE RELIEF THAT THEY ARE
20 SEEKING WOULD HAVE YOU RESET THE PREMIUMS AND PLACE YOURSELF
21 IN THE ROLE OF THE REGULATOR. THAT'S WHAT 1860.1 GOES
22 DIRECTLY TOWARDS.

23 1860.1(C), IN FACT, DOES, DOES ASK THAT THE COMMISSION --
24 THAT THE COMMISSIONER CONSIDER THE IMPACT ON -- PARDON ME. I
25 GOT MY STATUTORY QUOTES WRONG.

1 1860.1(C) AND 10 CCR 2094.1 STAND FOR THE PROPOSITION THAT
2 ONCE THAT PREMIUM RATE IS SET, THAT IS WHAT THE PREMIUM HAS TO
3 BE. IT CAN'T BE DEVIATED. SO IF YOU WERE TO SET A DIFFERENT
4 PREMIUM RATE IN THE RELIEF THAT THESE TWO PLAINTIFFS ARE
5 ASKING FOR, THAT WOULD PRESENT A CONFLICT FOR THE BOND.
6 RIGHT?

7 **THE COURT:** OH, NO, I GET THAT. THE ONLY QUESTION IS
8 WHETHER THE LAW -- LET'S SAY THAT THERE WERE, FOR SAKE OF
9 ARGUMENT, A CONSPIRACY AMONG THE SURETIES TO AGREE ON THE
10 RATES THAT THEY WOULD SUBMIT TO THE CALIFORNIA DEPARTMENT OF
11 INSURANCE. THE QUESTION IS, IS THAT CONDUCT UNLAWFUL? OR IF
12 IT HAPPENED, IS IT NONETHELESS ABSOLVED BY ONE OF THESE
13 IMMUNITIES THAT ARE BEING OFFERED UP?

14 I AM NOT GOING TO TELL THE DEPARTMENT OF INSURANCE WHAT
15 RATES THEY CAN POST.

16 **MR. HAMILL:** THAT WE'VE COVERED IN THE BRIEFS. THAT
17 WOULD BE COVERED BY NOERR-PENNINGTON.

18 **THE COURT:** YOUR OPPONENT -- I DID THINK OF ONE
19 QUESTION, TO ANSWER WHAT MS. MEJIA SAID.

20 YOUR OPPONENTS REALLY LIKE A CASE CALLED *PERRY*. I WAS
21 JUST SKIMMING THESE BRIEFS VERY QUICKLY. I DIDN'T SEE THAT
22 THERE WAS ANYTHING ABOUT THAT CASE IN THESE REPLY BRIEFS. I
23 COULD HAVE MISSED IT, THOUGH. I'M JUST DOING THIS AT THE
24 BENCH.

25 **MR. HAMILL:** YOU'RE TALKING ABOUT THE *PEREZ* CASE

1 OR --

2 **THE COURT:** THIS FIFTH CIRCUIT CASE, *PERRY* -- *PEREZ*.
3 OKAY.

4 **MR. HARVEY:** THAT'S THE NINTH CIRCUIT CASE.

5 **MR. HAMILL:** *PEREZ* IS THE NINTH CIRCUIT CASE.

6 **THE COURT:** WELL, THIS IS WHAT HAPPENS WHEN I DON'T
7 WRITE THINGS DOWN AND I'M JUST LISTENING TO PEOPLE AND I'M ON
8 THE BENCH. NEVER MIND THAT. USE THE MINUTES THE WAY YOU WANT
9 TO.

10 **MR. HAMILL:** I'LL YIELD THE FLOOR TO MY COLLEAGUES.

11 IF THEY'RE TALKING ABOUT THE *PEREZ* CASE, THE *PEREZ* CASE IS
12 A NINTH CIRCUIT CASE, WHICH WAS AN UNPUBLISHED CASE, BUT IT'S
13 UNREMARKABLE. ALL IT STANDS FOR IS THE PROPOSITION THAT IF
14 THERE'S AN OVERCHARGE, SOMETHING THAT'S NOT THE RATE THAT WAS
15 AUTHORIZED BY THE REGULATOR, THAT WAS DIRECTED BY THE
16 REGULATOR, THEN THERE COULD BE AN ANTITRUST CLAIM, THAT'S --

17 **THE COURT:** NO, IT'S *PERRY*. THE FIFTH CIRCUIT CASE.
18 FIFTH CIRCUIT 1979. IT'S CITED ON PAGE 21 OF THEIR BRIEF.

19 THIS IS A CASE THAT ONE OF YOUR -- THAT YOUR OPPONENTS
20 WERE TALKING ABOUT ON MCCARRAN-FERGUSON.

21 **MR. HAMILL:** OH. THIS WAS GOING TO WHAT THE SCOPE OF
22 THE BUSINESS OF INSURANCE IS.

23 **THE COURT:** RIGHT.

24 **MR. HAMILL:** THE ANSWER TO YOUR QUESTIONS ON THAT IS
25 WE HAVE TO LOOK AT THE *MACKAY* CASE. *MACKAY* IS THE CALIFORNIA

1 CASE. YOU ASKED ME BEFORE ABOUT WHAT THE BEST AUTHORITY WAS
2 AND I TOLD YOU TO GO TO THE GOOD WEATHER IN FLORIDA.

3 THE REAL BEST SOURCE FOR THIS IS MACKAY. MACKAY SAYS, AND
4 I THINK IT'S A DIRECT QUOTE, "THE BUSINESS OF INSURANCE IS
5 VERY BROAD."

6 SO THE BEST TWO PLACES FOR YOU TO LOOK ARE THE CALIFORNIA
7 COURTS, NOT THE FIFTH CIRCUIT, NOT MY LOVE OF THE SOUTHERN
8 DISTRICT OF FLORIDA, LOOK HERE IN CALIFORNIA.

9 **THE COURT:** VERY GOOD. I WILL READ GROVES AND
10 MACKAY. THANKS.

11 **MS. MEJIA:** YOUR HONOR, I'LL ADDRESS THE 12(B)(6)
12 ISSUE BRIEFLY BEFORE YIELDING THE FLOOR TO MS. HEALY.

13 AGAIN, YOU ARE ABSOLUTELY RIGHT, YOUR HONOR, THERE IS VERY
14 LITTLE SAID ABOUT THE PARALLEL CONDUCT. AND MY OPPONENTS HAVE
15 CITED SEVERAL PARAGRAPHS IN THE COMPLAINT, BUT, AGAIN, NONE OF
16 THOSE ALLEGATIONS SATISFY *KENDALL*, WHICH IS THE STANDARD HERE
17 IN THE NINTH CIRCUIT.

18 WHO DID WHAT TO WHOM, WHEN, AND WHERE; THERE'S NOTHING
19 ABOUT MEETINGS OR COMMUNICATIONS. THERE'S NOT AN ALLEGATION
20 ABOUT WHEN A PARTICULAR SURETY FILED ITS RATE APPLICATION. IT
21 COULD HAVE BEEN DONE OVER A PERIOD OF 15 YEARS AT DIFFERENT
22 TIMES. THEY SAY NOTHING ABOUT THAT.

23 AND THE SAME THING WITH THE DECLINATION TO PROVIDE
24 REBATES. THERE'S, AGAIN, NO FACTUAL ALLEGATIONS AS TO EACH
25 DEFENDANT AS IS REQUIRED IN THE CIRCUIT.

1 AND I WILL YIELD THE FLOOR TO MS. HEALY.

2 **THE COURT:** ALL RIGHT.

3 **MS. HEALY:** YOUR HONOR, MY POOR CLIENT,
4 MR. CARMICHAEL, HAS BEEN COMING IN FOR A LOT OF ABUSE FROM THE
5 PLAINTIFFS. I JUST WANT TO POINT THE COURT TO THE LAST TWO
6 PARAGRAPHS OF EXHIBIT 1.

7 I WOULD NOTE THAT PARAGRAPH 78 IN THE COMPLAINT, WHICH WAS
8 CITED BY MR. HARVEY AS ONE OF THOSE THAT HE CLAIMS KIND OF
9 SETS OUT THIS ALLEGED CONSPIRACY. THAT PARAGRAPH ONLY TAKES
10 SNIPPETS OF THE WORDS OF MR. CARMICHAEL. WHAT HE IS TALKING
11 ABOUT IS BAIL AGENTS ARE REBATING THEIR COMMISSIONS --
12 DISCOUNTING THEIR COMMISSIONS, AND CREATING A FINANCIALLY
13 UNTENABLE SITUATION IN WHICH SURETIES ARE GOING TO HAVE TO
14 STEP FORWARD AT SOME POINT. AND THAT'S WHAT HE'S TALKING
15 ABOUT.

16 HE'S NOT SECRETLY SIGNALING TO PEOPLE THAT AS AN EXECUTIVE
17 IN THE INDUSTRY HE IS GOING TO ENFORCE SOME ANTITRUST
18 CONSPIRACY. YOU CANNOT TAKE THESE WORDS WRITTEN IN 2005 AS
19 THE SIGNAL FOR AN ONGOING CONSPIRACY THAT LASTED ALLEGEDLY
20 UNTIL, YOU KNOW, JUST WHEN THE COMPLAINT WAS FILED.

21 **THE COURT:** THE ASTONISHING THING IN A LOT OF
22 ANTITRUST CONSPIRACIES IS NOT THAT WHEN PEOPLE ARE URGING
23 THEIR COLLEAGUES TO DO THE PROHIBITED CONDUCT, THAT THEY
24 DON'T -- THAT THEY AREN'T REALLY EXPLICIT ABOUT THE REAL
25 UNDERLYING MOTIVE.

1 THE ASTONISHING THING IS THAT OCCASIONALLY THEY ARE
2 EXPLICIT ABOUT THE UNDERLYING MOTIVE. THOSE ARE GREAT CASES.
3 THIS DOESN'T APPEAR TO BE ONE OF THEM, BUT ANYWAY.

4 **MS. HEALY:** AND I DO UNDERSTAND THAT. HOWEVER, I
5 WOULD POINT OUT TO THE COURT THAT JUST AS MS. MEJIA SAID,
6 THERE HAS TO BE MORE IN THIS COMPLAINT ABOUT EACH INDIVIDUAL.
7 IT IS NOT ENOUGH JUST TO SAY MR. CARMICHAEL OR MR. WATSON MADE
8 PUBLIC STATEMENTS OR THAT THE TRADE ASSOCIATIONS HELD MEETINGS
9 AT WHICH PEOPLE HAD OPPORTUNITIES TO CONSPIRE, AND YET THERE
10 ARE NO ALLEGATIONS THAT THEY ACTUALLY CONSPIRED. AND
11 OPPORTUNITY IS NOT A PLAUSIBLE ALLEGATION.

12 SO WITH THAT, I WOULD REST. THANK YOU, YOUR HONOR.

13 **THE COURT:** THANKS.

14 MR. HARVEY.

15 **MR. HARVEY:** VERY BRIEFLY, YOUR HONOR.

16 I'M GLAD THAT DEFENDANTS REFERRED TO THE MACKAY CASE
17 BECAUSE IT EXPLAINS, I THINK, EXACTLY THE RIGHT WAY TO LOOK AT
18 THIS.

19 MACKAY IS TRYING TO FIGURE OUT WHAT DO WE DO WITH THE
20 SECTION OF THE INSURANCE CODE BEFORE PROP 103 THAT USED TO BE
21 INTERPRETED TO REPEAL ANTITRUST LAWS GIVEN PROP 103 THAT WE
22 NOW HAVE.

23 AND MACKAY SAYS THAT WE KNOW THAT WE CAN'T INTERPRET THAT
24 SECTION IN THE WAY THAT GRANTS IMMUNITY FOR ANTITRUST
25 VIOLATIONS BECAUSE THAT'S WHAT PROP 103 IS ALL ABOUT. SO HOW

1 DO WE THREAD THIS NEEDLE?

2 THERE ARE A COUPLE OF KEY PASSAGES THAT I WILL DIRECT THE
3 COURT'S ATTENTION TO.

4 ONE IS AT PAGE 1443 OF MACKAY WHERE THE COURT SAYS THAT
5 SECTION 1860.1 QUOTE, "DOES NOT EXEMPT ALL ACTS PURSUANT TO
6 THE CHAPTER, WHICH IS TO SAY ALL RATE-MAKING ACTS, BUT INSTEAD
7 EXEMPTS ACTS DONE PURSUANT TO THE AUTHORITY CONFERRED BY THIS
8 CHAPTER."

9 THE CALIFORNIA DEPARTMENT OF INSURANCE DOES NOT HAVE
10 AUTHORITY TO IMMUNIZE ANTICOMPETITIVE CONDUCT. IT WAS
11 STRIPPED OF THAT JURISDICTION AND THAT AUTHORITY BY PROP 103.

12 AND TO MAKE IT CRYSTAL CLEAR, ON PAGE 1449, THE COURT
13 SAYS, QUOTE: "WE NOTE THE LIMITED NATURE OF OUR HOLDING.
14 INSURANCE CODE SECTION 1860.1 PROTECTS FROM PROSECUTION UNDER
15 LAWS OUTSIDE THE INSURANCE CODE ONLY ACTS DONE, ACTIONS TAKEN,
16 AND AGREEMENTS MADE PURSUANT TO THE AUTHORITY CONFERRED BY THE
17 RATE-MAKING CHAPTER."

18 THAT'S THE AUTHORITY THAT PROP 103 STRIPS -- OR THAT PROP
19 103 STRIPPED OF AUTHORITY OVER COMPETITION ISSUES. QUOTE, "IT
20 DOES NOT EXTEND TO INSURE CONDUCT NOT TAKEN PURSUANT TO THAT
21 AUTHORITY."

22 AND THAT'S EXACTLY WHAT IS AT ISSUE IN THIS CASE.

23 **THE COURT:** THANKS. THESE MOTIONS ARE UNDER
24 SUBMISSION.

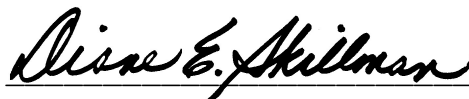
25 **MS. MEJIA:** THANK YOU, YOUR HONOR.

1 **THE CLERK:** COURT IS IN RECESS.

2 (PROCEEDINGS CONCLUDED AT 3:28 P.M.)

3
4
5 **CERTIFICATE OF REPORTER**

6 I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
7 UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
8 CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
9 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

10
11 

12 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

13 WEDNESDAY, OCTOBER 23, 2019